United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-7430

United States Court of Appeals

FOR THE SECOND CIRCUIT

LOCAL 771, I.A.T.S.E., AFL-CIO,

Plaintiff-Appellee-Cross-Appellant,

—v.—

RKO GENERAL, INC., WOR DIVISION,

Defendant-Appellant-Cross-Appellee.

B P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

PROSKAUER ROSE GOETZ &
MENDELSOHN
Attorneys for Defendant-Appellant-Cross-Appellee
300 Park Avenue
New York, New York 10022
(212) 593-9000

HOWARD N. MEYER
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New York, New York 10016
(212) 685-9800

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INDEX TO APPENDIX

[illegible]-0906 . Pollack,J. Local 644,I.A.T.S.E.,AFL-CIO,et. ano.-vs- RKO General,Inc. et.a

DATE	NR.	PROCEEDINGS
[illegible]2-24-75		Filed complaint and issued summons.
[illegible]-3-7[illegible]		Filed Partial Discontinuance as against Deft. Intnl Alliance of Theatrical and Stage Employees and complaint is amended [illegible] herewith served on you. Pollack,J.
[illegible]3-06-75		Filed Summons with Marshal's Returns. Served RKO Gen. Inc. WOR Div. by Vicki Walsh, 2/23/75 Intnl Alliance Theatrical &Stage Employees by Barbara Robinson, 2/26/75
02-28-75		Filed Pltffs Amended Complaint.
3-20-75		Filed Defts. ANSWER. RGHW&Q
1/12/76		Pre trial before Pollack, J.
03-02-76		Filed Stip&Order of substitution of attys for deft. RKO General, Inc. WOR-TV.
[illegible]3-15-76		Filed Partial Discontinuance Stipulation & Order as to pltff Local 644, I.A.T.S.E., AFL-CIO without prejudice, without costs. Pollack, J.
5/7/76		Pre trial before Pollack, J.
05-24-76		Filed Pltff's affdvt&notice of motion re:vacating &setting aside purported award of Arbitrator Eric Schmertz ret.6/4/76, Rm.1306, 2:00 P.M.
[illegible]-24-76		Filed Memorandum in support of motion to vacate award and compel arbitration.
[illegible]-24-76		Filed Pltffs documents for the court.
[illegible]-24-76		Filed Deft's affdvt&notice of motion re:order confirming arbitrator's award& directing judgment entered dismissing action ret.6/4/76. 2:00 p.m. Rm.1206
05-24-76		Filed Deft's memorandum in support of motion to confirm award.
06-14-76		Filed Affdvt of L.Robert Batterman for deft in opposition to pltff's motion to vacate arbitrator's award and in further support of deft's motion to confirm award and to dismiss action.
06-14-76		Filed Deft's Memorandum in opposition to motion to vacate and in further support of motion to confirm arbitrator's award and to dismiss action.
08-24-76		Filed Pltff's Suppl. Memorandum .
08-24-76		Filed Deft's Suppl. " in support of motion to confirm arbitrator's award&dismiss action.
08-24-76		Filed Pltff's reply memorandum in support of motion to vacate.
08-24-76		Filed OPINION# 45002. Motion to confirm arbitrator's award is granted and motion to vacate is denied, but the pending action for judicial relief may proceed in this court. So Ordered. Pollack, J(mm)
08-24-76		Filed Memo End. on motion of 5/24/76. Motion disposed of as set forth in Opinion filed herewith. So Ordered. Pollack, J(mm)
08-24-76		Filed Memo end. on motion of 5/24/76. Cross motion disposed of as set forth in Opinion filed herewith. So Ordered. Pollack, J. (mm)
09-10-76		Filed Defts. Notice of Appeal from Order of 08-24-76. Mailed copy to Howard N. Meyer 270 Madison Ave. New York, N.Y. 10016
09-22-76		Filed Pltff's Notice of Cross Appeal from order entered 8/24/76 denying pltff's motion to vacate and set aside and grants deft's motion to confirm award of an arbitrator acknowledged 4/9/76. (mailed copy to Proskauer Rose Goetz& Mendelsohn on 9/27/76)

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [signature]
Deputy Clerk

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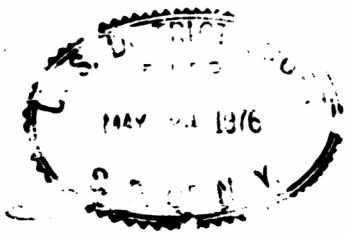
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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LOCAL 771, I.A.T.S.E., AFL-CIO, :

Plaintiff, :

-against- :

RKO GENERAL, INC., WOR DIVISION, :

Defendant. :

- x

75 Civ. 906 (MP)

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affidavit of L. Robert Batterman, sworn to May 24, 1976, and all prior proceedings herein, the undersigned will move this Court before Hon. Milton Pollack, U.S.D.J., in Courtroom 1306 of the United States Courthouse, Foley Square, New York, New York, on Friday, June 4, 1976, at 2:00 p.m. or as soon thereafter as counsel can be heard, for an order pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 9, 13, confirming the arbitrator's award herein dated April 9, 1976, and directing that judgment be entered thereon dismissing this action, and for such other and further relief as may be just and proper.

Dated: New York, New York
May 24, 1976

PROSKAUER ROSE GOETZ & MENDELSOHN

By _____
L. Robert Batterman
A Member of the Firm
Attorneys for Defendant
300 Park Avenue
New York, New York 10022
Tel.: 593-9000

TO:

HOWARD N. MEYER, Esq.
Attorney for Plaintiff
270 Madison Avenue
New York, New York 10016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

LOCAL 771, I.A.T.S.E., AFL-CIO, :

Plaintiff, :

-against- :

RKO GENERAL, INC., WOR DIVISION, :

Defendant. :

- x

75 Civ. 906 (MP)

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

L. ROBERT BATTERMAN, being duly sworn, deposes and says:

1. I am a member of the firm of Proskauer Rose Goetz & Mendelsohn, attorneys for defendant RKO General, Inc., WOR Division (hereafter the "Company"). I make this affidavit in support of the Company's motion to confirm the arbitrator's award herein and to dismiss the action. The arbitrator found that the dispute between the Company and plaintiff (the "Union") is not arbitrable because the Union failed to demand arbitration within the 90-day time limit in the collective bargaining agreement between the parties. (Copies of the collective bargaining agreement and the arbitrator's Opinion and Award are attached as Exhibits 1 and 2 respectively.)

2. The Company is the owner and operator of WOR-TV Channel 9 in New York City. On February 21, 1975 the Company assigned certain videotape editing work to employees other than members of the plaintiff Union. In spite of the

unambiguous contract language quoted below, under which the Union could have instituted arbitration proceedings to test its claim that the Company's work assignment violated the bargaining agreement, the Union chose not to do so but deliberately chose instead to file the complaint herein.* The Union did not file the demand for arbitration envisioned by the bargaining agreement until January 12, 1976.

3. Article XVI Section 16.01 of the bargaining agreement (Exh. 1 p. 14) provides:

> "The parties may submit to arbitration in accordance with the rules of the American Arbitration Association upon written request of either party, provided, however, that by mutual agreement the parties may agree to the selection of an arbitrator through other than the regular American Arbitration Association selection process."

Article XV Section 15.02 of the agreement provides:

> "...Arbitration must be resolved ninety (90) days after the occurrence of the event or ninety (90) days after the Union should have had knowledge of the event." (Exh. 1 p. 13)

4. The Union did not demand arbitration for more than 10 months after the Company's assignment of the work to other employees in February 1975. By letter dated January 12, 1976 (Exh. 5), the Union's attorney informed the Court that the Union was filing a demand for arbitration with the American Arbitration Association, and asked the Court to

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* A copy of the Union's amended complaint filed February 28, 1975 is attached as Exhibit 3. A copy of the Company's answer filed March 20, 1975 is attached as Exhibit 4.

There were two plaintiffs and two defendants originally. The action was discontinued as to defendant International Alliance of Theatrical and Stage Employees by notice from plaintiffs dated February 26, 1975 and as to plaintiff Local 644, I.A.T.S.E. by stipulation so ordered March 12, 1976.

retain jurisdiction "either for the purpose of (a) the motion to stay, if the employer actually authorizes his attorney to make such a motion, or (b) motion to confirm the award if such a motion is necessary." The Company did not move to stay the arbitration.

5. The Union filed a demand for arbitration with the American Arbitration Association on January 12, 1976 alleging that the Company violated the bargaining agreement "with respect to matters left undecided by N.L.R.B. Decision in Case 2CD 489."* Copies of the demand and counsel's letter to the AAA accompanying the demand are attached as Exhibits 6 and 7 respectively.

6. Eric J. Schmertz, Esq. was appointed arbitrator and held a hearing in this matter at the offices of the AAA on March 31, 1976. After hearing the evidence and arguments of counsel for the Union and the Company, the arbitrator found on April 9, 1976 that the dispute is not arbitrable in view of the Union's failure to file a demand for arbitration within the 90 days allowed by Section 15.02 of the bargaining agreement. The arbitrator held:

> "As the parties well know the arbitrator is bound by the provisions of the collective bargaining agreement including express time limits for the submission of disputes to arbitration where there has been no waiver thereof. The contract requires the referral of disputes to arbitration within ninety days. In the instant case the Union did not comply with that explicit time limit which the parties negotiated and made part of their collective agreement. Nor is there evidence of that waiver."

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* On August 18, 1975 the N.L.R.B. decided, in a proceeding under Section 10(k) of the National Labor Relations Act, that the members of the Union were not entitled to the "mechanical" as distinguished from the "judgmental" aspects of the editing work. A portion of the N.L.R.B.'s decision (219 NLRB No. 185) is quoted in counsel's letter to the Court, Exhibit 5.

"Accordingly the undersigned duly designated as the arbitrator and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

> The dispute set forth in the Demand for Arbitration filed by the Union with the American Arbitration Association and dated January 12, 1976 is not arbitrable."

(Opinion and Award Exh. 2 pp. 4-5)

7. It is evident that the award was proper in all respects and well within the arbitrator's powers. The Court is respectfully requested to confirm the award and to enter judgment dismissing the action.

L. Robert Batterman

Sworn to before me this
24th day of May, 1976.

Exhibit 1

MOTION PICTURE FILM EDITORS — LOCAL 771
of the International Alliance of Theatrical Stage Employees

630 NINTH AVENUE, NEW YORK, N. Y. 10036
Telephone JUdson 2-3723

February 6, 1975

Mr. George Snowden
WOR-TV
1440 Broadway
New York, N.Y. 10018

WOR, #771

Dear George:

This will confirm that our Agreement has been ratified and extended on the following basis:

1. A three (3) year Agreement effective January 1, 1975 through December 31, 1977.

2. A $60.00 increase for the three (3) years on the TV Re-Editor rate as follows:

   $22.00 the first year, $18.00 the second year, and $20.00 the third year. This percentage increase would apply to all other categories.

3. The incorporation of the Company's proposal # 5 into the Agreement.

4. The increased medical plan that is now in effect to be granted to members of the Bargaining Unit.

5. That all remaining terms and conditions of the present Agreement shall remain the same throughout the term of the new Agreement.

If the foregoing meets with your approval, please sign and return one (1) copy of this letter, and on receipt, we will prepare the full length Agreement.

Very truly yours,

Joel Appell
Joel Appell
Business Agent

ACCEPTED & APPROVED:

WOR-TV

Regan Goldfarb Hiller Wetzler & Quinn

Date: March 27, 1974

To: Paul J. Quinn

From: Peter A. Silverstein

Subject: WOR-TV - Local 771 IATSE (Film Editors): Agreement (and Supplemental Letter Agreement) as of January 1, 1972

In connection with my review of the March 20, 1974 draft of the captioned Agreement prepared by Local 771, I reviewed the following:

1. Draft of December 3, 1973.

2. Draft of March 20, 1973.

3. February 1, 1974 letter to Local 771 from George Gleason.

4. Memorandum of conference of March 14, 1974 by Paul J. Quinn, with Exhibits attached.

Except for two minor changes, the Exhibits attached to the Conference Memorandum were incorporated into the March 20, 1974 draft. The first change is that in Section 2.03, fifth line (page 3), the phrase "least senior" was used whereas the Conference Memorandum contained the phrase "junior". The second change is the deletion of the phrase "The Arbitrator shall not have the power to add to, modify or change any of the provisions of this Agreement" from Section 16.05 (page 14). However, substantially the same phrase appears in the same Article in Section 16.02 (page 14) of both the December 3, 1973 and March 20, 1974 drafts.

Except for one minor change and to the extent that the March 14, 1974 conference covered points raised in George's February 1, 1974 letter, the December 3, 1973 draft is unchanged. The most glaring omission is his suggested insertion in Article XX - New Practices and Procedures (page 16) of language covering the introduction of new equipment and the training of personnel.

The four copies of the draft of March 20, 1974 you gave me, plus a fifth copy, marked up, are attached.

PAS:DED
Attachments

addendum: On 3/27/74 we received a revised Article XV (marked "March 25 change") which includes the language suggested in George's 2/1/74 letter. The revised article is attached.

Motion Picture Film Editors

LOCAL 771

I.A.T.S.E.

1972 - 1974

A G R E E M E N T

with

WOR-TV - RKO GENERAL

New York, N.Y.

TABLE OF CONTENTS

TABLE OF CONTENTS
C O N T I N U E D

AGREEMENT entered into as of this 1st day of January, 1972 by and between RKO GENERAL BROADCASTING, A DIVISION OF RKO GENERAL, INC. for the WOR DIVISION, a corporation duly organized and existing under and by virtue of the Laws of the State of Delaware and having an office at 1440 Broadway, New York, N.Y. (hereinafter called the "Employer"), and MOTION PICTURE FILM EDITORS, LOCAL 771 of the International Alliance of Theatrical Stage Employees and Moving Picturn Machine Operators of the United States and Canada, located at 630 Ninth Avenue, New York, N.Y., a labor organization (hereinafter called "Local 771"), acting herein on its own behalf and on behalf of all the employees of the Employer covered by the terms of this Agreement, who are now in the employ and who may hereafter be employed by the Employer, subject to the provisions hereinafter contained.

W I T N E S S E T H:

WHEREAS, the Employer is engaged in the business, among other things, of editing and/or re-editing motion picture films, video and magnetic tape for transmission over its television channel, and utilizes in such business the services of Television Editors and Assistant Television Editors; and

WHEREAS, Local 771 has been certified by the National Labor Relations Board as the present collective bargaining representative of the employees hereinafter set forth; and

WHEREAS, the parties hereto desire to establish a standard of conditions under which the employees shall work for the Employer during the terms of this Agreement, and desire to regulate the mutual relations between the parties hereto;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable considerations, the parties hereto do mutually agree as follows:

ARTICLE I - Recognition

1.01 The Employer agrees to and does hereby recognize Local 771 as the sole and exclusive bargaining agent for all persons employed by the Employer covered by the classifications listed in Article III. The term "employee", as hereinafter used, means an individual employed by the Employer in one of the classifications listed in Article III.

1.02 All employees covered hereunder shall, as a condition of continued employment, be or become and remain members of Local 771 on the thirty-first (31st) day following either the date of the beginning of their employment or the date of execution of this Agreement, whichever is later, provided, however, that nothing herein contained shall require the employer to discharge or otherwise discriminate in any way against any employee who has been denied membership or has had his membership terminated for any reason other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. The failure of any employee covered hereunder to be or become and remain a member of Local 771 by reason of a refusal to tender the initiation fee or periodic dues as uniformly required shall obligate the Employer to discharge such person upon written notice to such effect by Local 771, unless such dues or initiation fees are tendered within five (5) working days after the receipt of such notice.

1.03 The Employer shall notify the Union in the event the Employer needs additional help; and the Union shall refer applicants, without discrimination as to their membership or non-membership in the Union, and the Employer shall have the right to determine which, if any, of the said persons referred by the Union shall be employed. In making such referral or selection, the parties shall give due consideration to the prior experience of the applicants in the industry, together with the applicant's competence to perform the work, but the Employer's decision whether such an applicant shall be employed shall be final, and shall not be subject to the grievance procedure provided below, or to arbitration.

1.04 New employees shall be on a trial basis for the first sixty (60) days of their employment, during which time the Employer may discontinue the services of such an employee without cause. The Employer shall notify the Union in writing, within seven (7) working days from the date of employment, of the employee's name, residence, social security number, classification, date of employment, and whether staff or free-lance basis.

ARTICLE II - Weekly Work Schedule

2.01 A regular workweek shall consist of forty (40) hours per week, five (5) consecutive days per week beginning at 12:00 A.M. on Monday, and continuing until 12:00 midnight the following Sunday. Each employee shall have two (2) consecutive days off in each workweek; however, Sunday and Monday shall be deemed consecutive days off. Two (2) days off shall consist of sixty (60) hours off consecutively. A tour of duty starting on any day and continuing into the following day shall be construed as one tour of duty and attributed to the first day.

2.02 A regular workday shall consist of eight (8) hours per day, including a paid meal period not to exceed one (1) hour. An employee shall be paid for not less than eight (8) hours work on any workday, including work on otherwise scheduled days off.

2.03 It is agreed that present practices relative to rotation of shifts shall be continued with the exception that mutually agreeable changes may be made. Accordingly, with respect to such so-called non-standard shifts, they shall normally be assigned to the least senior employees and such employees shall have the right to arrange among themselves the rotation of such non-standard shifts provided that such rotation is approved by the Company. Such approval shall not be unreasonably withheld.

2.04 The work schedule shall be posted not less than three (3) days prior to the beginning of the workweek; and shall not be changed, except in the event of illness or unforeseen emergency. If an employee is required to work hours other than those thus scheduled with less than seventy-two (72) hours notice of change in schedule, (except unscheduled hours caused by absence or lateness of other employees or unforeseen emergency) he shall be paid an additional one-half time his hourly rate for working each such unscheduled hours.

2.05 Emergency work shall be deemed to mean an unforeseen instance requiring immediate action which arises with regard to any phase of film editorial work covered by this Agreement.

In the event employees covered by this Agreement are not available to take such immediate action, it is agreed between the parties hereto that the Company may use other employees to perform such emergency work.

It is further agreed between the Company and the Union that if this understanding with respect to emergency work is intentionally or negligently violated, and discussions between representatives of Company and Union fail to resolve the matter satisfactorily, said understanding is subject to revocation by the Union.

2.06 An employee who works between the hours of 12:00 o'clock midnight and 8:00 A.M. shall be paid a night shift differential of Ten percent (10%) of his regular rate for all straight time hours worked during that period.

2.07 If an employee shall work in excess of ten (10) consecutive days without having received two (2) consecutive days off, he shall be paid at the rate of double time for all days worked in excess of ten (10) until such time as the employee has received his two (2) days off.

2.08 An employee called to work on a scheduled day off with less than thirty-six (36) hours notice thereof shall be paid a twelve dollar ($12.00) penalty in addition to any other compensation payable for such day, except in cases of absence of other employees or unforeseen emergencies. Effective January 1, 1974, this penalty shall become thirteen ($13.00) dollars. When an employee has been notified of an assignment on his day off and the employee is subsequently notified that such assignment is cancelled later than 4:00 p.m. on the prior day or at the end of his tour of duty on the prior day, whichever is earlier, the employee will nevertheless be paid a regular straight time day's pay for such assignment.

ARTICLE III - Duties and Classifications of Employees

3.01 A TV Editor shall be deemed to be a person whose duties consist of re-editing film (and screening for re-editing purposes) which is already part of a production so that the same may be of proper length for transmittal over television channels; (who may edit film used in assembling a news show, special programs or regularly scheduled feature which is not part of a production, and other similar duties related thereto.)

His duties shall also consist of editing and re-editing other television recordings. However, in the event another Union affiliated with the same parent body as Local 771 shall claim jurisdiction over such work, it is agreed that the matter shall be referred to the office of the International Union for its determination. In no event shall it be necessary for the Employer to engage personnel from more than one local union to edit or re-edit video tape or other television recordings.

He may also perform the duties of any other classification without diminution of pay or change of working conditions.

3.02 Assistant TV Editor shall be deemed to mean a person who is assigned to assist a TV Editor. His duties shall be such as are assigned to him and performed under the direction or supervision of a TV Editor who he has been assigned to assist.

3.03 A TV Editing Room Assistant shall work in and about the editorial rooms, film libraries, film receiving rooms and/or film vaults of or used by the Employer. His duties include splicing and rewinding film, cleaning film and splicing machines but, at no time, can he prepare film for broadcasting.

3.04 Film Editor shall be deemed to mean a person who exercised creative independent judgment in actually cutting or selecting, arranging in continuity, revising or correcting all elements of motion picture film, whether sound or silent. He may also edit documentaries. At no time, however, shall he be permitted to perform the duties presently being performed by the WOR News Department, which include the re-editing of any and all types of shows and the editing and re-editing of news film.

ARTICLE IV - Rates of Pay

4.01 The following rates of pay shall constitute the minimum weekly compensation payable to employees:

Classification	Effective 1/1/72	1/1/73	1/1/74
Film Editor	$285.00	$310.00	$325.00
TV Editor	227.00	245.00	258.00
Assistant TV Editor	176.00	191.00	200.00
TV Editing Room Assistant	132.00	143. 00	150.00

4.02 Regular employees shall receive at least the minimum of compensation above designated, depending upon the work for which they are engaged. Any regular employee who may now be receiving compensation in excess of the minimum rates prescribed above shall not have such compensation reduced as a result of this Agreement, nor shall any employee have his classification reduced during the term of this Agreement.

4.03 In the event a TV Film Editor is required to edit unedited film, or such other film which is not part of the production, or to assemble such other film into a production for telecasting, he shall receive additional compensation at the rate of one-half time his regular hourly rate for time spent on such work.

4.04 Wages shall be paid every two (2) weeks. When feasible, all overtime is to be listed separately on paycheck with indication of hour paid.

4.05 In the event the Employer engages an employee in any classification covered by this Agreement on a free-lance basis, i.e., for a period of sixteen (16) weeks or less, the employee shall be paid as follows:

Rates of Pay - Free Lance

Classification	Effective Jan 1, 1972 Weekly	Daily	Effective Jan. 1, 1973 Weekly	Daily	Effective Jan. 1, 1974 Weekly	Daily
Film Editor	$344.00	$71.00	$372.50	$76.50	$391.00	$80.00
TV Editor	261.50	54.00	283.50	58.50	297.50	61.50
Assistant TV Editor	187.00	38.50	202.50	42.00	212.50	44.00
TV Editing Room Assistant	137.00	30.50	148.50	33.00	156.00	34.50

ARTICLE IV - Rates of Pay
Continued

4.06 Employees hired for vacation relief or as replacements in the event of illness of a regular employee shall not be entitled to be paid as a free-lance employee. The status of a free-lance employee shall be determined at the time of his employment.

4.07 If an employee has a question or questions with respect to the computation of his pay check, he may ask his supervisor, who shall then explain the computation to the employee.

4.08 If and when requested in writing by Local 771, the Employer shall furnish Local 771, on a quarter yearly basis, a list of the names of the employees covered by this Agreement and the total monies paid each such employee by the Employer during the quarter year period covered.

ARTICLE V - Overtime

All employees shall be paid overtime, as follows:

5.01 All work performed in excess of forty (40) hours, inclusive of meal periods, within the regular workweek shall be paid for at the rate of time and one-half.

5.02 All work performed in any workday by an employee in excess of eight (8) hours shall be paid for at the rate of time and one-half. Said eight (8) hours shall include the meal period.

5.03 All work performed on the sixth (6th) day of the employee's workweek shall be paid at the rate of time and one-half and, in the event he should work in excess of eight (8) hours, overtime shall be at the rate of double time, which shall also be paid for work performed on the seventh (7th) day of the employees' workweek and any day for hours in excess of twelve (12) hours.

5.04 In no case shall overtime be paid more than once for the same work.

5.05 In the event any employee is directed to commence his day's work sooner than twelve (12) hours after the completion of his prior day's work, he shall be paid at the rate of double the straight time hourly rate for his work prior to the elapse of twelve (12)hours. If such day is a holiday or the employee's scheduled day off, he shall be paid at the rate of triple the straight time rate for all work prior to the elapse of twelve (12) hours.

ARTICLE VI - Vacations

6.01 Employees shall receive paid vacations in accordance with the following schedule:

After four (4) months, but less than eight (8) months	One (1) Week
After eight (8) months, but less than five (5) years	Two (2) Weeks
Over five (5) years, but less than nineteen (19) years	Three (3) Weeks
Over nineteen (19) years	Four (4) Weeks

An employee who completes twenty (20) years of continuous employment on or after April 1st, but before October 31st in any year, shall receive in such year three (3) additional days vacation with pay over and above his vacation entitlement.

6.02 April 1st of each year shall be the date used to determine the eligibility and amount of vacation due to an employee in such year. This date shall be without prejudice to the interests of employees currently employed.

6.03 The vacation period shall be from January 1st through December 31st inclusive. The employees shall take their vacations and the same may not be pyramided.

6.04 An employee who resigns or is laid off or discharged shall receive one (1) day of paid vacation for each month worked, since the preceding April 1st, provided he had a vacation in the preceding vacation period. If such an employee did not have a vacation in the preceding vacation period, then he shall be entitled to receive the vacation allowance to which he was entitled plus any accrued vacation.

ARTICLE VII - Holidays

7.01 Regular employees shall receive the following holidays with pay:

New Year's Day	Labor Day
Washington's Birthday	Columbus Day
Decoration day	Thanksgiving Day
Independence Day	Christmas Day

If any such holiday falls on Sunday, the following Monday (and not the Sunday on which such holiday falls) shall be deemed a holiday. If an employee is required to work on any of the holidays mentioned in this Article, he shall be paid at the rate of double time for the first eight (8) hours, and double and one-half time for any hours assigned and worked after said eight (8) hours except that if an employee works on Thanksgiving day, Christmas or New Year's he shall be paid at the rate of double time and, in addition, he shall be granted an additional day off to be added to his vacation period.

7.02 If a holiday falls on one of the employee's regular days off, then the employee may take such day off at another time satisfactory to him and the Employer; but, if such mutual agreement cannot be reached, then such day may be added to the employee's summer vacation.

ARTICLE VIII - Supper Money

In the event an employee is required to work ten (10) hours any day, he shall be allowed Four Dollars ($4.00) for supper.

ARTICLE IX - Discharge

No employee, employed for a period of sixty (60) days or more, shall be discharged except for good and sufficient cause. Any such employee, except in the event of dishonesty, insubordination or drunkenness on the job, shall be entitled to two (2) weeks' notice, or two (2) weeks pay in lieu thereof. All discharges are subject to the grievance procedure of this Agreement. The arbitrator shall be empowered to award damages for loss of pay in the event of a discharge.

ARTICLE X - Notice and Severance Pay

10.01 On layoff or discharge for other than dishonesty, drunkenness, or insubordination, a regular employee shall receive from his Employer (in addition to two (2) weeks' pay, in lieu thereof as in Article IX provided) severance pay in lump sum on the basis of one week's pay after six months' employment and for each additional full year of employment one week's pay -- and each part of a year of employment shall entitle the employee to the same proportionate part of a week's pay as the number of months of employment in such year shall bear to twelve months except that any employee who, after having receive a severance allowance hereunder, is rehired by the Employer and is there after laid off or discharged for any cause other than gross misconduct, shall have his years of service, for the purposes of this Article, computed from the date of such rehiring. For the purposes of this Article, a week's pay shall be the weekly rate, based upon the normal workweek, which the employee was receiving at the time of layoff or discharge, except employees who have bumped into lower rated classifications who shall receive severance pay pro rated on the basis of the classification he was in prior to bumping and his classification after having bumped.

10.02 In the event of death of an employee, the Employer shall pay to whomever the employee may have designated in writing, or to his estate, if no written designation has been made, an amount equal to the amount of severance pay such employee would have received had he been discharged on the date of death, provided, however, that from such amount there may be deducted by the Employer so much of the life insurance payable on the life of such employee at the time of his death as has been purchased for said employee at the sole expense of the Employer.

10.03 An Employee who shall have ten (10) or more years of service shall have the right, in the event that he shall become incapacitated as a result of illness or accident, to leave the employment of the Employer, and to collect severance pay as though he was discharged. Illness or accident shall be defined as a disability which shall incapacitate the employee from performing his regular duties hereunder for a period of six (6) months or more. At the request of the Employer, the employee shall submit to an examination by a doctor selected by the Employer. In the event of a dispute between the Employer and the Union, or the employee, as to whether such illness or accident is of six (6) months' duration, such matter shall be determined by arbitration as provided for in Article XVI hereof.

10.04 Seniority shall start on the date of employment by the company under the Local 771 contract.

ARTICLE XI - Layoff and Reemployment

11.01 The necessity for layoffs or reduction of staff shall be at the discretion of the Employer. All layoffs and rehirings will be made on the basis of seniority accumulated in the job classification in which the layoff occurs. In the event an employee in a higher paid classification shall be laid off, he shall have the right to displace (bump) anyone in a lower classification at the applicable rate, provided that the seniority which he has accumulated in all such higher classifications together with the seniority which he has accumulated in the lower classification into which he is bumped is more than the seniority accumulated in the lower classification by the employee who is being bumped. If he does not exercise such right, he shall nevertheless be entitled to receive severance pay as herein provided. In the event a vacancy shall occur in the higher classification, the employee who formerly worked in such classification shall fill the opening, without serving another trial period. Length of service shall be deemed the period in the Employer's employment in the classifications covered by this Agreement.

11.02 In hiring to fill a vacancy within any job classification, employees laid off from a job in such classification shall be rehired in inverse order of their layoff. An employee shall retain rehiring rights for a period of two (2) years after his layoff, provided he accepts a position offered to him in a classification in which he worked immediately prior to his layoff within seven (7) days after receiving notification from the Employer.

11.03 Notwithstanding anything to the contrary in paragraphs "11.01" or "11.02" of this Article, if any employee shall have been laid off because of reduction or decrease in staff, and shall have been rehired in the same capacity within a period of ninety (90) days from the date of layoff, then for the purpose of this Article, such employee shall be considered as having, on the date of his reemployment, the same length of service which he had on the date of his layoff. However, if any such employee shall not have been rehired until the lapse of more than ninety (90) days from the date of such layoff, then his employment shall be considered as having commenced on the date of rehiring.

11.04 The Employer shall notify the Union in writing of all layoffs and bumps of employees covered by this Agreement, at least seven (7) working days prior to any such layoff.

ARTICLE XII - Employees in Armed Forces and Reserve Units

12.01 Armed Forces

The Employer's obligation to any employee entering the Armed Forces of the United States shall, upon his honorable discharge from such service, be governed by such statutes and regulations as may at that time be applicable. Any employee who may be reemployed under this Article XII shall be given full credit for the period of his services with the Armed Forces in determining his seniority under Article X. The Employer may, in order to provide for any reemployment, lay off the employee with the least seniority in the particular job classification.

12.02 Reserve Units

Employees ordered to active service in reserve military forces of the United States or the National Guard shall be paid the difference between such military pay and their regular straight time pay for a period not to exceed four (4) weeks per calendar year. Employees will furnish suitable proof of orders, service or military pay, if requested.

ARTICLE XIII - Management of Business

All rights relating to the management and operation of the Employer's business are retained by the Employer, except to the extent specifically provided in this Agreement.

ARTICLE XIV - Strikes and Lockouts

During the term of this Agreement, Local 771 and the employees will not cause, sanction or take part in any strike, walkout, picketing, stoppage of work, retarding of work or boycott or any other interference with the efficient operation and conduct of the Employer's business. The Employer agrees that there shall be no lockouts for a like period.

ARTICLE XV - Grievance Procedure

15.01 The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract, and no other matters shall be subject to arbitration.

In the adjustment of such matters, the Union shall be represented in the first instance by the duly designated Committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances, there shall be no interference with the conduct of the business.

15.02 If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved, to the other party. The matter shall then be taken up for the adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided. Arbitration must be resolved ninety (90) days after the occurance of the event or ninety (90) days after the Union should have had knowledge of the event

ARTICLE XVI - Arbitration

16.01 The parties may submit to arbitration in accordance with the rules of the American Arbitration Association upon written request of either party, provided, however, that by mutual agreement the parties may agree to the selection of an arbitrator through other than the regular American Arbitration Association selection process.

16.02 The Arbitrator shall consider each case solely on its merits and this Agreement shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this Agreement.

16.03 The decision of the Arbitrator shall be binding upon both parties for the duration of this Agreement.

16.04 Should any party fail, upon written notice, to appear before the Arbitrator in any matter submitted for arbitration as herein provided, the Arbitrator may proceed with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

16.05 The Arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties.

ARTICLE XVII - Sick Leave

The Employer will grant to all employees covered by this Agreement sick leave in accordance with the Company's policy prevailing at the time.

ARTICLE XVIII - Scope of Agreement

The scope of this Agreement shall include all Film Editors, TV Editors and Assistant TV Editors, and Editing Room Assistants. All employees engaged in the re-editing and/or cutting and/or assembling of positive film prints and/or negative film. Music Film Tracks and Sound Effects Tracks are covered by this Agreement.

The scope of this Agreement shall also include foregoing work functions whether made on or by film, tape, or otherwise, and whether produced by means of motion picture cameras, electronic cameras or devices, tape devices or any combination of the foregoing, or any other means, methods or devices now used or which may hereafter be adopted. However, the work jurisdiction herein contained is subject to the same conditions and terms as those set forth in Article III - 3.01 hereof.

No technical film editing equipment, located in the film re-editin rooms of WOR-TV shall be operated by any person other than the employees covered by this Agreement. The company technical film editing equipment, for the purpose of this contract, shall be defined as those facilities of or available in the film editing room of WOR-TV.

ARTICLE XIX - Promotions

19.01 The Employer shall discuss all promotions with the business representative of the Union prior to making such promotions. It is the Employer's desire that such discussions shall result in agreement upon the individual to be promoted. Promotions shall be based upon seniority and qualifications. Promotions shall be made from among employees covered by this Agreement, provided they are qualified.

Promotions shall be on a trial basis of thirty (30) calendar days during which the employees shall receive the rate for the new job. If the employee is deemed unsatisfactory upon the completion of thirty (30) calendar days, he shall be returned to his former classification without loss of seniority.

19.02 The Employer shall notify the Union in writing of all promotions in jobs covered by this Agreement not later than seven (7) working days following the effective date of such promotion.

ARTICLE XX - New Practices and Procedures

20.01 In the event that the Employer shall institute any major change in its methods of performing film editing by reason of technological developments in film editing equipment and/or processes, which change is likely to affect substantially the job security or the job content of employees hereunder, it agrees to notify the Union, reasonably well in advance, of the institution of such change; and, if the Union so requests, it will discuss with the Union the necessity for the creation of a new job classification and the necessity for other changes in the terms and conditions of employment; provided, such new process, equipment or device shall be operated solely by employees covered by this Agreement, except that the Employer may elect to assign such operation to persons not covered by this Agreement, but if the Employer so elects, the Employer shall notify Local 771 reasonably in advance of such assignment, and if Local 771 so requests, will discuss such assignment and if no agreement is reached with respect thereto, the Union may terminate this Agreement upon at least sixty (60) days' written notice to the Employer. Any questions arising under this Article XX may be submitted to arbitration, and if the Employer demands arbitration of the issue that the Union is not terminating the Agreement in compliance with the provisions of this Article XX, the Union may not terminate the Agreement until after issuance of an arbitration award holding that the Union is terminating in compliance herewith.

20.02 If the Company introduces the use of new equipment and assigns employees covered by this agreement to operate and maintain such new equipment, the Company shall provide reasonable training for such employees so assigned to such new equipment.

20.03 Nothing herein contained shall be construed to mean that the Employer is prohibited from making such a change. The Union agrees that the Employer may make such a change in its sole discretion.

ARTICLE XXI - Miscellaneous

21.01 In the event that any of the terms and provisions of this Agreement shall be, at any time during the term hereof, in conflict with or inconsistent with any applicable State or Federal law, or any regulations or decisions thereunder, such provision shall be deemed to be null and void to the extent of such conflict or inconsistency, but such invalidity or ineffectiveness shall not in any manner affect the validity or effectiveness of any of the other provisions of this Agreement.

21.02 This Agreement states the complete understanding of the parties for the term of this Agreement; and the parties agree that no matters subject to collective bargaining remain unresolved for the term thereof.

21.03 When a Supervising TV Editor is employed, he shall be a member of Local 771 in accordance with the terms hereof, and he shall be paid not less that Twenty Percent (20%) above the highest TV Editor's salary prevailing in the department.

21.04 Any employee who is a member of Local 771 and who shall be hired, elected or appointed to the office of Business Agent, or to any other position in Local 771 that requires that he be absent from the service of the Employer, shall be granted a leave of absence for two (2) years, during which time his seniority shall not be affected.

ARTICLE XXII - Sub-Contracting

The Employer shall continue to have employees covered hereunder perform all the type of work presently performed by them during the term hereof.

However, the Employer may sub-contract work that requires the services of a Film Editor, In such event, the party to whom such work is sub-contracted shall observe labor standards and conditions not less favorable than those contained herein.

In the event the Employer should employ a Film Editor from a source outside of the employees covered hereby, such employee shall have no right to bump any employee in a lower classification to avoid a layoff.

Should the Employer promote an employee from among its regular employees to the position of Film Editor, such employee, if his services as a Film Editor are no longer required, may bump an employee in a classification lower than his to avoid a layoff.

ARTICLE XXIII - No Flat Fee

Neither the Employer nor the employees shall enter into any agreement, or attempt to do so, whereby compensation for editorial service is determined or arranged for on a fee or job basis, or upon terms inconsistent with the provisions hereof, including overtime pay provisions.

ARTICLE XXIV - Pension Fund

Effective on July 1, 1973, the Employer shall pay into the Trust Fund under the Local 771 Editor-Film Producers Pension Plan, established by Agreement and Declaration of Trust dated July 1, 1961, a sum equal to thirty-seven and one half cents (37½¢) per hour for each hour worked by each employee covered by this Agreement, not exceeding forty (40) hours per week, including paid lunch hours, for all staff employees; and for such number of hours as are actually worked by all freelance employees covered by this Agreement for the purpose of securing pension benefits for said employees as provided by said Plan.

Contributions required hereunder shall be due and payable on the tenth (10th) day of the month following the month for which they accrued. The Employer shall furnish a monthly statement containing the names of the employees and the dates of their employment on whose account contributions are made.

The obligations to make payments hereunder shall be conditioned upon the approval of the Internal Revenue Service, under the provisions of the Code, as amended, permitting the deduction of the contributions as a business expense.

ARTICLE XXV - Insurance

The Employer shall pay full cost and expense for each employee covered by this Agreement for coverage under the RKO General, Inc. New York Employees Group Insurance Plan for "Without Dependent Coverage".

ARTICLE XXVI - Work in Higher Classifications

In the event any employee is requested to perform work in a higher classification, he shall be paid at the higher rate of the scale applicable to such higher classification for not less than four (4) hours and, in the event he shall work in such higher classification in excess of four (4) hours, then he shall be paid for not less than eight (8) hours, in any one day in which he worked in such higher classification. For the purpose of this paragraph, editing unedited films by a TV Film Editor as provided in Article IV, paragraph 4.03 shall be considered performing work in a higher classification.

ARTICLE XXVII - Successors and Assigns

This Agreement shall be binding upon and inure to the benefit of the parties, their successors and assigns.

ARTICLE XXVIII - Prior Obligation of Local 771, IATSE

As Local 771 is a member of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, nothing in this contract shall ever be construed to interfere with any obligation which Local 771 owes to such International Alliance by reason of a prior obligation.

ARTICLE XXIX - Term of Agreement

Except as hereinabove specified to the contrary, this Agreement shall be retroactive to and remain in full force and effect from January 1st, 1972 to and including December 31st, 1974.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

RKO GENERAL BROADCASTING
a DIVISION OF RKO GENERAL, INC.
for the WOR DIVISION

By_____ Date:_____

By_____ Date: _____

MOTION PICTURE FILM EDITORS,
LOCAL 771

By_____ Date: _____

LOCAL 771, IATSE
630 Ninth Avenue
New York, N.Y. 10036

RE: RKO-WOR-TV - Local 771 IATSE
1972-1974 Agreement

Gentlemen:

In connection with past negotiations of our Collective Bargaining Agreement, discussions were held concerning the employment of employees to perform emergency work. In connection therewith we agree as follows:

Emergency work shall be deemed to mean an unforeseen instance requiring immediate action which arises with regard to any phase of film editorial work covered by this Agreement.

In the event employees covered by this Agreement are not available to take such immediate action, it is agreed between the parties hereto that the Company may use other employees to perform such emergency work.

It is further agreed between the Company and the Union that if this understanding with respect to emergency work is intentionally or negligently violated, and discussions between representatives of Company and Union fail to resolve the matter satisfactorily, said understanding is subject to revocation by the Union.

If the foregoing is satisfactory to you, please sign a copy of this letter under the word "APPROVED", and date it.

Very truly yours,

RKO GENERAL, INC.
WOR DIVISION

By_____

APPROVED

LOCAL 771, IATSE

By_____

Date _____

Exhibit 2

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In The Matter of The Arbitration between	
Local 771 I.A.T.S.E., AFL-CIO	OPINION AND AWARD
and	Case #1330 0046 76
RKO General, Inc./WOR Division	

The threshhold issue between the above named parties is whether the dispute set forth in the Demand for Arbitration filed with the American Arbitration Association and dated January 12, 1976, is arbitrable.

A hearing was held at the offices of the American Arbitration Association on March 31, 1976 at which time representatives of the above named parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

I find that the dispute is not arbitrable.

Article XV Section 15.02 of the contract between the parties requires in pertinent part that:

> "Arbitration must be resolved ninety (90) days after the occurrence of the event or ninety (90) days after the Union should have had knowledge of the event."

The "event" involved in this dispute was a decision by the Employer on or about February 21, 1975 not to assign certain "judgemental or creative" work in connection with news editing to members of the bargaining unit represented by the Union. I conclude that it occurred and the Union knew of it on or about

February 21, 1975. On February 24, 1975 and as a consequence of the Employer's action or decision, two other local Unions (Locals 664 and 52) also allegedly affected thereby, com d picketing at the Employer's location. Local 771 respected the picket line. (The picketing resulted from the Employer's work assignment decision and became the subject of a jurisdictional proceeding before the NLRB). I conclude that the picketing and the respect of the picket line was a further manifestation of the knowledge and protest by all the local unions of the Employer's assignment of the disputed work to members of the Radio and TV Department unit.

Also on February 24, Local 771 together with one of the other local Unions (Local 664) filed a civil action in the United States District Court, Southern District of New York seeking an Order directing a consolidated arbitration. That complaint substantively included the Union's claim that the Employer had and was assigning the disputed work to employees who were not members of the bargaining unit represented by the Union, in violation of the Union's collective bargaining agreement with the Employer. Also the Union acknowledges that on or about February 21st certain members of Local 771 affected by the Employer's decision were required to "bump down" to other work assignments.

Accordingly I conclude that on or about February 21, 1975, the "event" occurred and/or the Union "had knowledge of the event" within the meaning of Section 15.02 Article XV of the collective bargaining agreement.

It is clear and undisputed that if the aforementioned ninety (90) day provision does not mean that the arbitration must be filed and completed within that time, it means at least, that the request for arbitration must be appropriately filed or the dispute referred to arbitration within ninety days after the event occurs or the Union has knowledge of the event.

In the instant case the Union did not file a Demand for Arbitration with the American Arbitration Association until January 12, 1976. I cannot deem its civil action in Federal Court for an Order directing a consolidated arbitration as a filing for arbitration under the provisions of the contract. The civil action complaint and its subsequent amended complaint were not a demand for or filing for arbitration. Nor could they be construed to "refer" the dispute to arbitration. They were applications for an Order directing arbitration, and it remained to be seen whether the Court would grant any such order. More determinative perhaps is the fact that Article XVI Section 16.01 of the contract between the parties provides for submission to arbitration "in accordance with the rules of the American Arbitration Association...., provided however that by mutual agreement the parties may agree to the selection of an arbitrator through other than the regular American Arbitration Association selection process." (Emphasis added). The civil action in Federal District Court cannot be construed as a submission to arbitration "in accordance with the rules of the

American Arbitration Association" nor, because there was no mutual agreement, can it be construed as an effort to select an arbitrator through some other selection process. Indeed I am satisfied that the Union could have filed a Demand for Arbitration with the American Arbitration Association within at least ninety days of February 21, 1975, and still, simultaneously or in conjunction therewith, moved in Federal Court for an Order joining other parties in that arbitration. But the Union did not do so.

Finally I cannot construe letters dated January 12, 1976 from counsel for the Union to Judge Milton Pollack of the United States Southern District Court and to Mr. Frank Zotto of the American Arbitration Association as constituting either a directive from the Court authorizing arbitration on the merits, or as a waiver by the Employer of its right to challenge arbitrability for failure to comply with the time limits of Article XV. There is no indication that the Employer accepted the substance of those letters nor that the Court acted upon those letters in any directory or authoritative manner.

As the parties well know the Arbitrator is bound by the provisions of the collective bargaining agreement including express time limits for the submission of disputes to arbitration where there has been no waiver thereof. The contract requires the referral of disputes to arbitration within ninety days. In the instant case the Union did not comply with that explicit time limit which the parties negotiated

and made part of their collective agreement. Nor is there evidence of that waiver.

Accordingly the Undersigned duly designated as the Arbitrator and having duly heard the proofs and allegations of the above named parties makes the following AWARD:

> The dispute set forth in the Demand for Arbitration filed by the Union with the American Arbitration Association and dated January 12, 1976 is not arbitrable.

Eric J. Schmertz
Arbitrator

DATED: April 9, 1976
STATE OF New York)
COUNTY OF New York) ss.:

On this ninth day of April, 1976, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Scott M Schwartz

SCOTT M. SCHWARTZ
Notary Public, State of New York
No. 24-[illegible]
Qualified in [illegible] County
Term Expires March 30, 1977

Exhibit 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOCAL 644, I.A.T.S.E., AFL-CIO and
LOCAL 771, I.A.T.S.E., AFL-CIO

Plaintiffs

- against -

RKO GENERAL, INC., WOR DIVISION

Defendant

AMENDED COMPLAINT

CIVIL ACTION 75/906

Plaintiffs for their complaint herein allege:

1) Jurisdiction of Plaintiffs' action is conferred on this Court by Section 301 of the Labor-Management Relations Act of 1947 as amended (29 U.S.C. 185).

2) This is an action for a declaratory judgment, pursuant to 28 U.S.C. Sec. 2201 for the purpose of determining a question of actual controversy between the parties, as well as an action to enforce contracts between an employer and a labor organization in an industry affecting commerce, in which affirmative relief as well as damages will be sought.

3) Plaintiffs Local 644 and Local 771 are labor organizations representing employees in an industry affecting commerce and are both affiliated as Local Unions with the International Alliance of Theatrical and Stage Employees, commonly referred to as IATSE and hereinafter referred to as "International Union," which is also a labor organization representing employees in an industry affecting commerce.

4) Defendant RKO General, Inc., WOR Division, (referred to as "Employer" herein) is on information and belief a Delaware corporation with its principal place of business in New York City, and is engaged in commerce within the meaning of the Labor-Management Relations Act.

FOR A FIRST CAUSE OF ACTION IN BEHALF OF LOCAL 644
AGAINST DEFENDANT

5) At all relevant times the defendant Employer has recognized plaintiff Local 644 as the sole and exclusive bargaining representative for newsreel cameramen employed by it in connection with its business as a television broadcaster.

6) By collective bargaining agreement by and between Local 644 and Employer "all cameramen in the employ of the station" are required to be or become members of Local 644, and said collective bargaining agreement has, for many years, established the terms and conditions of cameramen employed by defendant.

7) By contract and agreement between plaintiff and International Union there has been conferred on plaintiff Local 644 sole jurisdiction to organize and represent moving picture cameramen including specifically "television cameramen" and implicit in such grant of sole jurisdiction is an obligation fairly to represent and defend plaintiff Local 644 and the rights of its members in respect of any matter involving employment of television cameramen in New York City.

8) In or about late 1974 or early 1975 defendant WOR Division acquired a number of additional television cameras. Said cameras were in function and in purpose identical to cameras theretofore employed in the production of newsreels by defendant Employer and produced moving pictures requiring editing in the same fashion as newsreel motion picture cameras previously acquired, save to the extent that the editing thereof was to be performed on videotape instead of motion picture film.

9) International Union has organized a so-called Radio and Television Department consisting of employees who are not assigned to or members of any local union within, but are direct members of, said International Union.

10) Said International Union in behalf of its direct members as aforesaid has entered into a collective bargaining agreement with defendant Employer which specifically provides, among other things, that "nothing contained herein shall be construed as a claim to work which is already under contract to another union" and which also provides "this agreement shall not include any of the following employees of the employer ... classification of employees covered by the collective bargaining agreements between the employer and affiliated locals of the union." In addition thereto, by action duly taken on February 23rd, 1975, the International Alliance of Theatrical and Stage Employees declared as follows:

"At a meeting of the General Executive Board on Sunday, February 23, 1975, at San Francisco the jurisdictional problem at WOR-TV created by the advent of electronic news gathering was considered with great care. The Board was of the opinion that the function of gathering news and the nature of the work responsibilities therein involved remain essentially the same regardless of whether film or tape cameras are used. The Board concluded therefore that Locals 52, 644 and 771 should not be deprived of their jurisdiction nor suffer a loss of jobs by reason of the Employer's decision to cover news with electronic instead of film equipment. Accordingly, the International President with concurrence of the General Executive Board, acting pursuant to the authority vested in them by the International Constitution and By-Laws, have determined that jurisdiction over the electronic news gathering functions at WOR-TV belongs to Locals 52, 644 and 771 and their members. Members of the I.A. in the engineering unit of the station are hereby directed to comply immediately with this determination.

Walter F. Diehl, International President,
I.A.T.S.E."

- 3 -

11) The Employer Defendant has threatened to and taken action to discharge the cameramen employed by it who have been represented by Local 644 and replace them with employees who are or will be members of said International Union's Radio and Television Department, in violation of its collective bargaining agreement with plaintiff Local 644.

12) Said actions by the Employer have been pursued despite the commitment by the International Union that employees of the Radio and Television Department shall not be placed in such jobs.

13) The collective agreement between plaintiff Local 644 and WOR Division contains no arbitration clause covering this dispute.

14) Plaintiff Local 644 herein is entitled to a declaration and adjudication that defendant Employer is under an obligation to continue to hire and employ cameramen solely under said collective agreement with plaintiff Local 644 to function as described under said agreement, and for appropriate affirmative and injunctive relief and damages.

FOR A SECOND CAUSE OF ACTION IN BEHALF OF PLAINTIFF LOCAL 771 AND AGAINST DEFENDANT

15) Plaintiff Local 771 repeats and re-alleges paragraphs 1,2, 3,4,8,9 and 10 above.

16) The collective agreement between Plaintiff Local 771 and Defendant Employer is with respect to the work function of editing motion pictures and said agreement specifically provides that "the scope of this agreement shall also include the foregoing work functions, whether made on or by film, tape, or otherwise, and whether produced by means of motion picture cameras, electronic cameras, or other devices, tape devices, or any combination of the foregoing..."

17) Said agreement further provides that the parties may submit to arbitration, in accordance with the rules of the American Arbi-

tration Association, upon written request of either party, any complaints, disputes or grievances involving questions of interpretation or application of any clause or matter covered by said agreement.

18) The decision referred to in paragraph 10 hereof is binding upon Defendant WOR under its agreement with the International Union.

19) Despite and in violation of its contractual obligations as alleged in paragraph 16 hereof and the express limitation described in paragraph 10 hereof, the Employer has unilaterally announced that it proposed to permit members of International Union's Radio and Television Department to perform the function of motion picture editing on newsreels produced by the cameras referred to in paragraph 8 hereof, and to discharge members of Plaintiff Local 771.

20) The District Court has jurisdiction and power to order an arbitration between plaintiff Local 771 and defendant Employer with respect to the matters in dispute herein relating to the editing of newsreels and the threatened intention of the Employer to employ persons not represented by Local 771 to perform editing of newsreels on the new cameras heretofore referred to herein and pending such arbitration to grant appropriate affirmative or injunctive relief.

21) Plaintiffs do not have a plain, adequate and speedy remedy at law.

WHEREFORE, Plaintiffs respectfully pray that this Court:

1) Adjudge that the Defendant employer is obligated to employ cameramen to operate all of its cameras for the purpose of photographing and broadcasting news events and other motion pictures who shall be governed as to terms and conditions of employment by

the collective agreement between said Defendant and Plaintiff Local 644.

2) Direct that there be an arbitration of the dispute between Local 771 and Defendant RKO General, Inc. wherein the rights and obligations of the parties may be respectively determined.

3) Provide appropriate equitable relief directing defendant to act in compliance with its agreements with Plaintiffs and to refrain from acting to prejudice plaintiffs' rights herein.

4) Grant such other and further relief as to the Court may seem just and proper, including reinstatement with back pay of any employees dismissed as a result of defendant's actions and damages including counsel fees, together with the costs of this action.

/s/ Howard N. Meyer

HOWARD N. MEYER
Attorney for Plaintiffs
270 Madison Avenue
New York,N.Y. 10016
212 685 9800

February 26, 1975

Exhibit 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOCAL 644, I.A.T.S.E., AFL-CIO and LOCAL 771, I.A.T.S.E., AFL-CIO Plaintiffs -against- RKO GENERAL, INC., WOR DIVISION Defendant	ANSWER CIVIL ACTION 75/906 JUDGE MILTON POLLACK

Defendant RKO GENERAL, INC., WOR DIVISION, by its attorneys REGAN GOLDFARB HELLER WETZLER & QUINN, for its answer to the complaint herein, alleges upon information and belief:

1) Denies the allegations of paragraph 1 except admits that plaintiffs purport to ground jurisdiction on Section 301 of the Labor-Management Relations Act of 1947 as amended.

2) Denies the allegations of paragraph 2 except admits that plaintiffs purport to bring this action for a declaratory judgment for the purpose of determining a question of actual controversy between the parties, as well as an action to enforce contracts between an employer and a labor organization in an industry affecting commerce in which affirmative relief as well as damages is sought.

3) Admits the allegations of paragraphs 3, 4 and 13.

4) Denies the allegations of paragraphs 5 and 6 and refers to the collective bargaining agreement currently in force between defendant and plaintiff Local 644 for the terms and conditions thereof.

5) Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs 7 and 9.

6) Denies the allegations of paragraphs 8, 11, 12 and 14.

7) Denies the allegations of paragraph 10, and refers to the collective bargaining agreement currently in force between I.A.T.S.E. and defendant covering Engineering, Recording and Air Conditioning Employees and Electricians for the terms and conditions thereof, except denies knowledge or information sufficient to form a belief as to the actions alleged to be taken by the I.A.T.S.E. and requests that the court strike said allegations as immaterial.

8) Interposes the same answers to the paragraphs realleged in paragraph 15 as are interposed hereinabove.

9) Denies the allegations of paragraphs 16 and 17 and refers to the collective bargaining agreement currently in force between plaintiff Local 771 and defendant for the terms and conditions thereof.

10) Denies the allegations of paragraphs 18, 19, 20 and 21.

As and For a First Affirmative Defense

11) This Court is without jurisdiction of the subject matter of this action. In any event primary jurisdiction over the activity which is the subject of the complaint herein lies with the National Labor Relations Board.

As and For a Second Affirmative Defense

12) The complaint fails to state a claim upon which relief can be granted.

As and For a Third Affirmative Defense

13) Plaintiffs have failed to join parties needed for just adjudication under F.R.C.P. 19(a).

WHEREFORE, defendant RKO GENERAL, INC. WOR DIVISION demands judgment dismissing the complaint herein, with costs and disbursements of this action.

KEGAN DFARB HELLER WETZLER
& QUI..N

By /s/ William P. Keegan
A Member of the Firm
Attorneys for Defendant
RKO GENERAL, INC.
WOR DIVISION
445 Park Avenue
New York, New York 10022
(212) 754-3000

Exhibit 5

HOWARD N. MEYER
LAW OFFICE
270 MADISON AVENUE
NEW YORK, N. Y. 10016
(212) 685-9500

January 12, 1976

Hon. Milton Pollack
United States District Court
Southern District of New York
U.S. Courthouse, Foley Square
New York, N.Y. 10007

Re: Locals 644 and 771 IATSE
against RKO General, Inc.
WOR Division
Civil Action 75/906

My Dear Judge Pollack:

As I informed you during the conference on this case this morning in Chambers, the branch of the case (first cause of action) involving plaintiff Local 644 has been effectively disposed of by the NLRB decision in which Local 644 has acquiesced without seeking judicial review. Hence it is my intention at an appropriate time to enter into a stipulation and submit an order discontinuing the action as to Local 644. An offer of such stipulation was made to the counsel for the defendant without response to date.

However, the NLRB decision in the case which involved some of the problems presented by this civil action reserved certain matters for further disposition by other means than NLRB determination. As will be seen from page 13 of the Board's mimeographed opinion in 219 NLRB Number 185:

> "The editing work involves two separate functions: the judgmental function of determining which material is to be retained for the program and which is to be edited out and the mechanical function of operating the technical equipment needed to edit the tape. Local 771 apparently claims the entire tape editing process, both the judgmental function and the actual operation of the videotape editing machines. The Engineers claim only the operation of the electronic videotape editing machines, and only such of the judgmental and creative function which becomes necessary in the absence of instructions from those to whom the judgmental function has been assigned. It is clear, therefore, that only that aspect of tape editing which involves the operation of the technical equipment is in dispute herein."

In view of the foregoing, there would be no color of defense to a motion for summary judgment compelling arbitration. However, as I stated at the conference this morning, I determined that it would be most constructive to file a demand for arbitration under the rules of the American Arbitration Association, the designating agency named in the contract with the employer. Then if the employer really has some serious basis for objecting to arbitration, it can make an appropriate motion for a restraining order.

I think this is a constructive and salutory solution, and I am glad to have the Court retain jurisdiction, either for the purpose of (a) the motion to stay, if the employer actually authorizes his attorney to make such a motion, or (b) motion to confirm the award if such a motion is necessary.

I appreciate your courtesy in making your Chambers available for the conference this morning, January 12, 1976.

Sincerely,

Howard N. Meyer

HNM:rf
cc:Regan,Goldfarb,Heller
Wetzler & Quinn,Esq.
:Joel Appell,L.771
:Wm. Horgan, L.644
:American Arb. Assn.

Exhibit 6

American Arbitration Association

VOLUNTARY LABOR ARBITRATION RULES

DEMAND FOR ARBITRATION

DATE: January 12,1976

TO: (Name) RKO General,Inc. for the WOR Division
(of party upon whom the Demand is made)

(Address) 1440 Broadway

(City and State) New York,N.Y. 10036
Attn: Messrs. Jeffrey Ruthizer
& Robert Williamson

The undersigned, a party to an arbitration agreement contained in a written contract,

dated January 1, 1975 providing for arbitration,

hereby demands arbitration thereunder.
(attach arbitration clause or quote hereunder)

NATURE OF DISPUTE: Employer's breach of obligations under Article XVIII of Collective Bargaining Agreement and Arbitration clause of collective bargaining agreement as well as all other pertinent clauses, with respect to matters left undecided by NLRB Decision in Case 2CD 489

REMEDY SOUGHT: Damages and enforcement of Employer's obligations under Article XVIII and otherwise of agreement in force since January 1, 1975.

HEARING LOCALE REQUESTED: New York,New York

You are hereby notified that copies of our arbitration agreement and of this demand are being filed with the American Arbitration Association at its New York Regional Office, with the request that it commence the administration of the arbitration.

Signed [signature] Edward H. Levy

Title Attorney for Local 771

Address 270 Madison Avenue

City and State New York,N.Y. 10016

Telephone 685 9800

To institute proceedings, please send three copies of this Demand with the administrative fee, as provided in Section 43 of the Rules.

Exhibit 7

January 12, 1976

Mr. Frank T. Zotto
Labor Arbitration Tribunal
American Arbitration Assn.
140 West 51st Street
New York,N.Y. 10020

Re: RKO General,Inc./WOR Division
and Local 771

Dear Mr. Zotto:

Enclosed herewith please find Demand for Arbitration which is being prepared and served by the undersigned because of certain pending litigation. Article XVI of the pending contract between the parties is excerpted and sent you herewith.

There is presently pending in the Southern District of New York an action by Local 771 against the WOR Division of RKO General, Inc., Civil Action 75/906, in the Court assigned to Judge Milton Pollack. At a conference before Judge Pollack in chambers this morning it was suggested, and the Judge agreed, that at this point in the proceedings a motion for summary judgment for an order compelling arbitration could be dispensed with, since, as the Judge indicated, the AAA will process the Demand for Arbitration unless the employer makes a motion for a stay. It was the sense of the meeting that the employer is to make a motion to stay if he does not wish to arbitrate, but absent a motion for stay with a temporary restraining order preventing arbitration, the Association is to proceed to process the case.

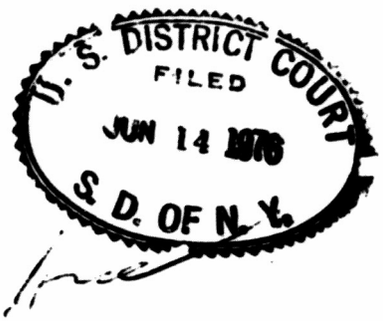
For the foregoing reasons, it is requested that the case be processed promptly and that there be no extensions of time granted to WOR's attorneys, who have been using dilatory tactics for several months in this matter.

Respectfully yours,

Howard N. Meyer

HNM:rf
cc:Joel Appell,Bus. Agt. L.771

P.S. : The Administration fee will be paid by Local 771 directly.
-HNM



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOCAL 771, I.A.T.S.E., AFL-CIO,

Plaintiff,

-against-

RKO GENERAL, INC., WOR DIVISION,

Defendant.

75 Civ. 906 (MP)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

L. ROBERT BATTERMAN, being duly sworn, deposes and says:

1. I am a member of the firm of Proskauer Rose Goetz & Mendelsohn, attorneys for defendant RKO General, Inc., WOR Division. I make this affidavit in opposition to plaintiff's motion to vacate the arbitrator's award dated April 9, 1976, and in further support of defendant's motion to confirm that award and to dismiss this action.

2. Annexed hereto are true copies of the following documents:

Exhibit 8 - AAA Demand for Arbitration served by plaintiff on defendant on May 20, 1976.

Exhibit 9 - Order dated April 10, 1975 granting temporary injunction in Sidney Danielson v. International Alliance of Theatrical Stage Employees, Locals One, 52, 644

and 771 (S.D.N.Y., 75 Civ. 1620).

3. The Court is respectfully requested to deny plaintiff's motion, and to grant defendant's motion to confirm, for the reasons set forth in my affidavit and defendant's memorandum dated May 24, 1976 and in defendant's memorandum dated June 14, 1976, submitted herewith.

L. Robert Batterman

Sworn to before me this
14th day of June, 1976.

FRANKLIN [illegible]
Notary Public [illegible]
Qualified [illegible]
Commission expires [illegible]

Exhibit 8

VOLUNTARY LABOR ARBITRATION RULES

DEMAND FOR ARBITRATION

DATE: May 20, 1976

TO: (Name) Jeffrey Rutheizer, RKO General Broadcasting
(of party upon whom the Demand is made)

(Address) 1440 Broadway

(City and State) New York, New York 10018

The undersigned a party to an arbitration agreement contained in a written contract,

dated January 1, 1975 providing for arbitration,

hereby demands arbitration thereunder.
(attach arbitration clause or quote hereunder)

NATURE OF DISPUTE Employer's breach of obligation under Article XVIII o the Collective Bargaining Agreement as well as other pertinent parts of agreement with respect to the editing of such motion pictures as t two 20-minute Chinese productions for use on "Journey to Adventure" in circumstances where they may be transferred to video tape or otherwise

REMEDY SOUGHT
Damages and order directing compliance with contract as to all editing of Motion Pictures whether transferred to videotape or any other means, methods or devices now used or which may hereafter be adopted.

HEARING LOCALE REQUESTED New York City

You are hereby notified that copies of our arbitration agreement and of this demand are being filed with the American Arbitration Association at its New York City Regional Office, with the request that it commence the administration of the arbitration.

Signed [signature] Genung

Title Assistant Business Agent

Address 630 9th Avenue, Room 1002

City and State New York, New York 10036

Telephone JU-2-3728

To institute proceedings, file two copies of this Demand with the above-stated fee as provided in Section 14 of the Rules.

MEMBERSHIP MAILING
420 MADISON AVE
NEW YORK CITY 10017

Exhibit 9

D STATES DISTRICT COURT
FOR THE . OUTHERN DISTRICT OF NEW YORK

----------x

SIDNEY DANIELSON, Regional Director, Region 2 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

75 Civil 1520 CLB

Petitioner,

v

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, LOCALS ONE, 52, 644, 771,

Respondents.

----------x

ORDER GRANTING TEMPORARY INJUNCTION

This cause came on to be heard upon the verified petition of Sidney Danielson, Regional Director of Region 2, of the National Labor Relations Board, for and on behalf of said Board, for a temporary injunction pursuant to Section 10 ( ) of the National Labor Relations Act, as amended, pending the final disposition of the matters involved pending before said Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in said petition. The Court, upon consideration of the pleadings, evidence, briefs, argument of counsel, and the entire record in the case, has made and filed its Findings of Fact and Conclusions of Law, finding and concluding that there is reasonable cause to believe that respondent has engaged in acts and conduct in violation of Section 8(b)(4)(i)(ii)(D) of said Act, affecting commerce within the meaning of Section 2(6) and (7) of said Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is

ORDERED ADJUDGED AND DECREED that respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it or them pending the final disposition of the matters involved herein pending before the Board, be and they hereby are, enjoined and restrained from:

(a) Picketing WOR-TV at its New York City offices and sound studio; or

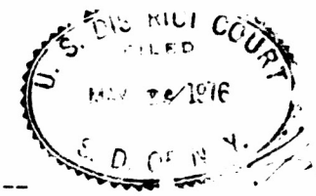
(b) In any manner, or by any means, engaging in, or inducing or encouraging any individual employed by WOR-TV, or any other person engaged in commerce or in industries affecting commerce, to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle any goods, articles, materials or commodities, or to perform any services; or

(c) Threatening, coercing, or restraining WOR-TV, or any other person engaged in commerce or in an industry affecting commerce where in any case under (a), (b) or (c) above, an object thereof is to force or require WOR-TV, or any other persons, to assign or cause the assignment of the operation of video tape cameras for news gathering to employees who are members of or represented by respondents rather than to employees who are members of or represented by Engineers, or who are not members of or represented by any of the respondents; and it is further

ORDERED, ADJUDGED AND DECREED that as a condition of this injunction that when and in the event Station WOR-TV utilizes external lighting in conjunction with the Video Tape camera aforementioned then and in such event said external lighting shall be handled by the employees covered by the collective bargaining agreement by and between LOCAL 52, IATSE and WOR-TV.

Dated at New York, New York
this 10th day of April 1975

Charles L. Brieant Jr.
United States District Judge



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOCAL 771, I.A.T.S.E., AFL-CIO

Plaintiff

- against -

RKO GENERAL, INC., WOR DIVISION

Defendant

NOTICE OF MOTION

CIVIL ACTION
75/906

JUDGE MILTON POLLACK

SIRS:

PLEASE TAKE NOTICE that on the pleadings and all the proceedings herein, and on the affidavit of Howard N. Meyer sworn to on May 21, 1976, and the Exhibits therein referred to, the undersigned will move this Court at Room 1306, U.S. Courthouse, Foley Square, New York, at 2:00 P.M. in the afternoon of June 4, 1976, for an order pursuant to 9 U.S.C. Sec. 10 and 29 U.S.C. Sec. 185 vacating and setting aside the purported award of Arbitrator Eric Schmertz, acknowledged April 12, 1976, as arbitrary, capricious, so far beyond the bounds of rationality as to palpably reflect partiality, and made and executed in manifest disregard of law.

Plaintiff will at said time and place apply for an order directing arbitration before another arbitrator to be selected according to the rules of the American Arbitration Association.

New York,New York
May 24, 1976

Yours, etc.
Howard N. Meyer
Attorney for the plaintiff

to: Proskauer,Rose,Goetz
& Mendelsohn,Esqs.
300 Park Avenue
New York,N.Y. 10022
Attorneys for Defendant

270 Madison Avenue
New York,New York 10016

Howard N. Meyer

(8)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOCAL 771, I.A.T.S.E., AFL-CIO

Plaintiff

- against -

RKO GENERAL, INC., WOR DIVISION

Defendant

AFFIDAVIT:

MOTION TO VACATE AWARD

CIVIL ACTION 75/906

JUDGE MILTON POLLACK

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
CITY OF NEW YORK)

HOWARD N. MEYER, being duly sworn, says: I am the attorney for the plaintiff, Local 771. This affidavit is submitted in support of a motion to vacate a purported award of April 12, 1976 and to compel arbitration on the merits of a labor dispute, and in opposition to an anticipated motion to confirm the award and dismiss this action.

1) As is evident on the face of the contested "award," the arbitrator refused to exercise his powers to pass on the merits of a dispute concerning which, in its initial phase, an action seeking arbitration was filed with this Court within four days after the dispute arose: his pretext for so doing was (1) that the arbitration agreement required referral to arbitration within 90 days and (2) that this suit to compel arbitration did not constitute in his view an invocation of arbitration.

2) There are other aspects of this case that require a finding that the action of the arbitrator was arbitrary and capricious: for example, the employer promptly and unequivocally refused to arbitrate under the Local 771 contract early on in that 90 day period (a) by defendant's very pleading in this action and (b) by implementing its refusal to abide by the contractual

grievance and arbitration procedure by filing a charge with the National Labor Relations Board (invoking Section 8(b)(4)(D) of the Act: work assignment dispute) on February 27, 1975, triggering a procedure whereby the employer (defendant herein) intended and sought to get Board determination as to a number of related work assignment disputes, including plaintiff's claim as described in paras. 16 and 19 of the complaint herein, and (c) by the position taken by defendant at the New York State Mediation Board in early March, 1975.

3) Furthermore, as will appear from this affidavit, the plaintiff's initial contract grievance was mooted by the action of the NLRB in its processing of the unfair labor practice charge involving the work assignment dispute, of which it took jurisdiction, as sought by the employer. The Board, in effect, amended and limited the scope of the contractual claim to work with respect to which the plaintiff could present a grievance. The NLRB did not relinquish jurisdiction of the overall work assignment unfair labor practice case initiated by the defendant until November 28, 1975, when it dismissed the Complaint in case 2CD 489, in which the defendant herein was the charging party invoking the jurisdiction of the NLRB, and the plaintiff but one of the Respondents.

4) It is the plaintiff's submission that the purported award is "so completely divorced from rationality," so arbitrary and capricious, so manifestly in disregard of the law, and so violative of the statutory requirements (9 U.S.C. Sec. 10) that it must be vacated and denied enforcement, (a) <u>on its face</u>, insofar as it declines to treat as a request for arbitration a Federal

Court action seeking to compel arbitration; (b) on the face of the pleadings, insofar as it palpably disregards the defendant's persistent refusal in its pleadings and by its actions to arbitrate; (c) on the record as a whole, which demonstrates that the initial grievance of February, 1975 could not have been arbitrated in the light of the NLRB's action herein, and that a new dispute arose not earlier than November 17, 1975, when the employer was presented with plaintiff's newly-formulated grievance as to the matters left undecided by the NLRB's interlocutory decision in case 2CD 489, its so-called 10(k) decision. Moreover, the dispute, being a multi-party one, is covered procedurally by relevant case law rather than a contract limited to bilateral arbitration.

5) The record made at the hearing at which Mr. Schmertz was considering the claim of ninety-day time-bar (raised by the defendant for the first time only after a pre-summary judgment motion conference with the court on January 12, and not even hinted at by the employer's counsel during the course of that conference) consisted of a number of documents which will be referred to herein as well as a testimonial narrative of the relevant context as related by the undersigned:

The exhibits included: Joint Exhibit 1, the Collective Bargaining Agreement and

Union Exhibit ("UX")1, January 12. paper sent to AAA describing nature of dispute;

UX 2, letter to AAA Tribunal Administrator of even date with UX 1 of which a copy was sent to the court;

UX 3, letter to the court of even date with the foregoing, recording and describing (without protest or disagreement from the employer-defendant) the sense of the pre-motion conference of January 12;

UX 4 and 5, the Complaint and Amended Complaint herein;

UX 6, the full text of NLRB decision D294, 219 NLRB No. 185, in case 2 CD 489, initiated by the employer, which terminated the 10(k) phase of the 8(b)(4)(D) proceeding, of which NLRB

did not relinquish jurisdiction until November 28, 1975;

UX 7, a December 8, 1975, letter of the undersigned to counsel for the defendant notifying the latter of my desire for a prompt conference with Judge Pollack on a contemplated motion for summary judgment directing arbitration.

UX 8, the brief submitted by Locals 644 and 771 at the 10(k) hearing; and

UX 9, the defendant's Answer to the Amended Complaint herein, (an Answer that was not amended after the substitution of new counsel for defendant, which occurred only subsequent to the designation of the arbitrator and the revelation of his identity.*1)

6) In that Answer, (March 18, 1975) defendant rejected arbitration on the following stated grounds:

"As and for a First Affirmative Defense

(11) This court is without jurisdiction of the subject matter of this action. In any event, primary jurisdiction over the activity which is the subject of the complaint herein lies with the National Labor Relations Board.

"As and for a Second Affirmative Defense

(12) The complaint fails to state a claim upon which relief can be granted.

"As and for a Third Affirmative Defense

(13) Plaintiffs have failed to join parties needed for a just adjudication under FRCP 19(a)."

Defendant never moved to add such party or parties as it alleged to be necessary, but never withdrew that Third Defense.

7) The claim of insufficiency of parties was pressed by defendant's attorney Gallagher at the January 12, 1976 pre-motion conference; it was renewed at the hearing before Mr. Schmertz by Mr. Batterman of the recently substituted Proskauer firm, who asserted

---

*1. I am obliged to state that based on past experience I would not have acquiesced in the assignment of this case to Arbitrator Schmertz if I had known that the attorney for the defendant at the arbitration was going to be the Proskauer law firm, that was substituted herein. The rules of the American Arbitration Assn. do not permit a revocation of designation of an arbitrator after there has been mutual agreement and selection by the tribunal administrator of an arbitrator mutually agreed upon.

(for the first time in the history of the overall dispute) that still another labor organization, the Writers Guild, should be given the work which plaintiff was seeking to have assigned to it. Mr. Batterman said that if the arbitrator ruled against him on time-bar the employer would not further participate in the arbitration without first "going to court within 48 hours" to move (presumably to implement, belatedly, the Third Affirmative Defense) for a consolidated arbitration of the present grievance with a supposed grievance concerning the Writers Guild (AFTRA) contract.

8) As the pleadings in this action will show, plaintiff initially sought a consolidated arbitration under Columbia Broadcasting System, Inc. v. American Record and Broadcasting Association, 414 F.2nd 1326. This was done to expedite arbitration in view of the fact that the initial February 1975 grievance involved assignment of work claimed by plaintiff to a group of employees represented by another labor organization under another collective bargaining agreement. That labor organization was the International Union (IATSE) with which plaintiff Local 771, an autonomous Local, is affiliated, and which has an unusual structure involving direct membership by a certain class of employees whom it represents directly.

9) The Amended Complaint, filed February 26, 1975, quoted in paragraph 10 the text of an official action by the International Union, IATSE, in effect disclaiming interest in the assignment made by the employer: a disclaimer which the NLRB later declined to find to be effectual except in part, and to which defendant in its Answer herein made reference as follows:

"Denies knowledge or information sufficient to form a belief as to the actions alleged to be taken by the IATSE and requests that the court strike said allegations as immaterial." (Emph. supp.)

The persistence of the probability of the need for multilateral arbitration supports a separate and independent ground for vacatur of the purported award. Multi-party arbitration is not provided for or contemplated by the collective bargaining agreement between the plaintiff and defendant. Multi-party arbitration is a creature of the federal common law and judicial decision. The possible need for a court to direct arbitration has been constantly present in this case and was even raised, albeit with still another alleged union claimant to the work, by Mr. Batterman at the Schmertz hearing. All this has a separate and independent bearing on the vulnerability of the Schmertz award.

10).A companion action, Moshlak v. RKO General,Inc. WOR-TV, 75 Civ. 877, came on for initial hearing on a motion for a temporary injunction on or about March 6, 1975. (Moshlak was Local 52 of I.A.T.S.E., one of the labor organizations including the two initial plaintiffs in this action, Local 644 and Local 771, which were involved in the NLRB case and related matters.) Because Local 771 contemplated a motion for summary judgment in order to expedite arbitration,(defendant's Answer had not yet been filed March 6) I attended and participated in that temporary injunction hearing. The then attorney for the employer, Mr. Gallagher, resisted Moshlak's motion on the ground, inter alia, that the matter was "before the National Labor Relations Board" and that he expected the Board to assume jurisdiction and issue a Notice of 10(k) Jurisdictional Dispute Hearing shortly. With reference to this the court said, or indicated in substance, to counsel for all these plaintiffs, that he was not disposed to

entertain applications for relief in these cases if the NLRB should assume jurisdiction, nor take further action until after the NLRB relinquished jurisdiction.

11) The chronology of the NLRB proceedings, insofar as herein is relevant, is: the filing by the employer of its charge on February 27, 1975, the issuance of the 10(k) Notice of Hearing on March 24, 1975; hearings resulting in several hundred pages of transcript and multiple exhibits on April 10th and 11th and May 1 and 5, 1975; interlocutory decision issued August 18, 1975 (DE-294, 219 NLRB No. 185); issuance of NLRB unfair labor practice complaint based on charge 2 CD 489 on October 30, 1975; and termination of NLRB proceedings and relinquishment of jurisdiction by dismissal of complaint by Regional Director, November 28, 1975.

12) As is evident from the documentary exhibits UX 1 through 9 (placed in evidence at the arbitration) and from my testimony there as summarized herein, the nature of the grievance and the dispute tendered for arbitration by and described in UX 1 is quite different from the dispute that appeared to exist prior to the assumption of jurisdiction by the NLRB and the Board's action thereon. Indeed this is plain on the very face of UX 1, drawn and filed January 12, 1976 and describing the dispute of which arbitration was requested:

> " Employer's breach of obligations under Article XVIII of Collective Bargaining Agreement and Arbitration clause of Collective Bargaining Agreement as well as all other pertinent clauses, <u>with respect to matters left undecided by NLRB decision in Case 2 CD 489</u>." (Emph. supp.)

The language underlined could not have conceivably been used prior to the NLRB interlocutory decision of August 1975 (on which Region 2 issued Complaint October 30, 1975.) That quoted language in UX 1 represents an objective appraisal of a fundamentally

transformed contractual relationship between plaintiff and defendant that was produced by the Board decision on the defendant/employer's initiative.

13) The arbitrator's so-called award makes no reference to or examination of the effect of the NLRB proceeding or the effect of the employer's referral of the dispute to the NLRB. His opinion misdescribes the February dispute as having to do with the "judgmental or creative" aspect of film editing. This is not accurate and indicates that he did not read or understand the Exhibits, expecially UX 1 itself.

14) To explain more fully the statements in the foregoing paragraphs, we begin with the Collective Bargaining Agreement, which was Joint Exhibit 1 before the Arbitrator. There in Article XVIII it is provided under the caption "Scope of Agreement"

> "The scope of this Agreement shall include both Film Editors, TV Editors, and Assistant TV Editors, and Editing Room Assistants. All employees engaged in the re-editing and/or cutting and/or assembling of positive film prints and/or negative film. Music Film Tracks and Sound Effects Tracks are covered by this Agreement.
>
> "The scope of this Agreement shall also include the foregoing work functions whether made on or by film, tape or otherwise, and whether produced by means of motion picture cameras, electronic cameras, or devices, tape devices, or any combination of the foregoing, or any other means, methods or devices now used, or which may hereafter be adopted." (Emph. supp.)

The agreement of the parties as expressed in the foregoing clause (referred to in paragraph 16 of the Complaint) certainly seems to indicate that defendant's television editing requirements were to be fulfilled by assignment of the work to plaintiff's members whether the material to be broadcast had been photographed and recorded on motion picture film or elec-

tronic video tape.

15) A complex and multi-party dispute arose in February 1975 when the employer, which had previously used motion picture film cameras for news gathering, switched to a portable electronic camera, that recorded images on videotape. Defendant had employees outside of the plaintiff's bargaining unit, who worked under a labor agreement covering a miscellaneous group of employees performing primarily technical and electrical functions. That other agreement contained language which arguably overlapped in part with the Local 771 agreement with respect to the editing of electronic tape.

16) The employer could have but persistently declined to permit that overlap question to be considered by an arbitrator to be appointed under this contract. These other employees were (as above indicated, Par. 8) not members of any local union, but direct members of the International Union, IATSE, in its Radio and Television Department, sometimes referred to as the "R and T Unit," and also as "IATSE Engineers." The employer's decision that sparked the overall controversy, was to assign to the R&T Unit not only (a) the image editing claimed by Local 771, but also (b) the electronic camera handling, claimed by Local 644 and (c) the light and sound technical engineering, claimed and theretofore performed by members of Local 52 (Moshlak.)

17) The decision to assign the work to the R&T Unit rather than to the three Locals 771, 644 and 52, was followed by the employer's discharge of all Local 644 and 52 members, and a reduction in the staff of Local 771 members. (Other Local 771 personnel were retained for the purpose of continuing to edit old movies that were shown on WOR-Television and for other purposes not presently relevant.)

18) Picketing activity by the discharged workers was begun on February 24, 1975. (Locals 52 and 644 had no arbitration clause) The International Union called upon its Locals to respect the picket line, a call which was respected by members of Local 771 and an additional local of IATSE stagehands, Local 1 and another. The directive of the International Union, IATSE, was disregarded by the WOR technical employees in the "R&T Unit" in violation of their own internal obligations to the International Union. (*2) At the same time these lawsuits (Moshlak and the present action by both 644 and 771) were begun. In its initial Complaint Local 771 sought to have tripartite arbitration of the dispute with respect to overall editing work, contemplating as parties the employer, itself, and the initial co-defendant International Union, IATSE.

19) The complaint was amended when there was a disclaimer of the work assignment by IATSE. However, that disclaimer was ignored both by the R&T Unit rank and file employees and by the employer . Moreover, the employer, inconsistently with its original announcement (and testimony by Robert Hennessy, an R&T Employee at the NLRB Hearing which it adopted in its brief there, p. 48,) later said the work or part of it would or should be done first by the Directors Guild members, and later by Writers Guild members. In any event, the employer promptly made manifest that it would not consent to bilateral arbitration as called for by the contract. It did so not only by filing its charge in NLRB case 2 CD 489, but also by its subsequent Answer herein.

---

*2. This led to still another NLRB proceeding, only recently concluded, concerning attempted internal union discipline for disregard of the picket line, see International Alliance of Theatrical and Stage Employees (RKO General, Inc.WOR-TV Division) 223 NLRB No. 142, April 20, 1976.

The employer also refused arbitration in March, 1975, by the position it took at the New York State Mediation Board, which had assigned a mediator (because of the picketing) to attempt to adjust the dispute. Mr. Gallagher, as a witness for the defendant at the Schmertz arbitration, confirmed my statement that he had taken a firm position that the employer would refuse to participate in arbitration unless (a) all unions in all crafts claiming all aspects of the work were made parties and (b) the arbitrator (contrary to the contract) was required to apply NLRB jurisdictional disputes criteria in making his determination. 20) Having accepted and assumed jurisdiction of the overall dispute, (over resistance by Locals 52, 644 and 771 which, as to Local 771, was based on its desire to have the matter decided by arbitration, see the decision in 219 NLRB No. 185, slip op. pp. 9-14) the NLRB commenced hearings, received briefs and made a decision in the preliminary 10(k) phase of its procedures, 219 NLRB No. 185, which will be furnished to the Court. 21) The following is a summary, for convenience, of the 10(k) disposition which preceded the 8(b)(4)(D) Complaint of October 30, 1976. With one exception the Board decided that the employer's choice of work assignment was to be given effect. This had totally adverse consequences with respect to Locals 52 and 644. However, there was only a partly adverse result with respect to Local 771, as appears from the portion of the NLRB decision quoted in my letter to the Court of January 12, 1976. (set forth, for convenience, in Para. 27 below.) For present purposes, it is sufficient to say that the effect of the NLRB decision was de facto to amend the RKO-WOR agreement with Local 771 so that Local 771 could not claim the mechanical or non-judgmental aspect of editing tape for television news broad-

cast but to leave open for an entirely new disposition between the parties what was to be done with respect to a work assignment of the "judgmental" function.

22) What this meant was explained to the arbitrator in the following terms, as part of my statement and in an attempt to clarify the substantive issue that was submitted by UX 1: Motion picture editing involves a mechanical aspect, and a creative aspect. The latter requires the editor to view the motion picture or segment of news reportage recorded by the camera and make discretionary decisions requiring artistic judgment as to which combination or assemblage of images should be kept (and which discarded -- sometimes 1½ minutes of news motion pictures are kept out of 15-30 minutes that are "shot ") and how they are to be rearranged or juxtaposed to tell the essence of the story. The former, or mechanical aspect, with respect to motion pictures on film, requires mere physical cutting and splicing. As to video tape, the non-creative work involves the use of an electronic console, to bring about without physical cutting of the tape, the rearrangement, omissions, etc., that may be desired.

As I told the arbitrator, the judgmental or creative work was epitomized in regard to feature motion pictures by some remarks made during the televised Academy Award ceremonies, and I paraphrased the following, of which I now have the text:

"March 29, 1976. Academy Awards

Goldie Hawn: The next award is for Film Editing.

George Segal: And such an important one. Editing is one of the most sensitive, indispensable, parts to the business.

Goldie: Really, George?

George: Oh absolutely, Goldie. It implies the assemblage of the creative outpourings of the writer; the nuances and effluences of the director; the deeply subjective gift of the actor; the instincts of the producer; the r[illegible]ic of the cinematographer; it determines [illegible] shape, the form, the thrust, and the rhythm of a motion picture. That's what editing means to me. What does it mean to you, Goldie?

Goldie: It means, uh, it means, some guy slapped two piec[illegible] of film together, and Warren Beatty gets all the close ups."

23) Before the new issue, based on the NLRB's impact on the contractual relations,could be presented to the employer and before any decision, favorable or otherwise, could have been made by the employer with respect to the new factual and bargaining situation created by the NL[illegible]B decision, it was first necessary for the overall NLRB proceeding to be concluded. Judicial review could not be sought at once with respect to the NLRB's interlocutory 10(k) ruling, but only after the issuance of a formal complaint alleging violation of 8(b)(4)(D). Such a complaint was issued by the Regional NLRB office on October 30, 1975. By early November, 1975, Local 771 determined that it would not seek judicial review to contest the 10(k) disposition and I so notified the Employer's then attorney, Mr. Gallagher, and requested a meeting between him, myself, the Business Agent, and his director of operations and Vice President, Mr. Williamson, which took place November 17, 1975.

24) As a result of that meeting, to which I testified before Schmertz, there arose <u>for the first time</u> a dispute or grievance as to whether or not the employer would, in the aftermath of the NLRB decision, assign the non-mechanical editing function to Local 771, as we claimed on November 17th the employer was

obliged to do under the contract, and which the employer was not insulated against by the NLRB proceedings or decision. It was only after this meeting that there followed in sequence the events that led to the demand for arbitration, and the documents of January 12, 1976, all of which were well within 90 days after November 17, 1975, as Arbitrator Schmertz well knew.

25) For example, the very description of the issue submitted to the AAA on January 12 was one that could not have been framed prior to the disposition of the NLRB proceedings: (UX 1, on AAA form:)

> "Employer's breach of obligations under Article XVIII of Collective Bargaining Agreement and Arbitration clause of Collective Bargaining Agreement as well as all other pertinent clauses, with respect to matters left undecided by NLRB decision in Case 2 CD 489." (Emph. supp.)

That submission to the AAA, especially the language underlined, would not have made sense, could not have been drafted prior to the interlocutory NLRB award. Mr. Schmertz did not truthfully record in his opinion any aspect of these matters and disingenuously omitted all reference to the NLRB decision. The sentence that opens the last paragraph of page 1 of the Schmertz "opinion" makes reference to "a decision by the Employer on or about February 21, 1975 not to assign certain 'judgmental or creative' work in connection with news editing," etc. This distorts and "covers up" the fact that the concept of separating out the judgmental or creative aspect of the work did not originate until the NLRB decision in August and a grievance with regard to it did not arise until after November 17, 1975. The quoted language describes the grievance that the AAA was asked to pass upon, and it was with regard to this new issue that Schmertz declined to act, although that is not at all clear because of this distortion in his opinion.

26) As indicated above,the new issue presented by the position taken by the plaintiff after evaluating and deciding to acquiesce in the NLRB decision was presented for the first time to the employer at a luncheon meeting on November 17, 1975, and I so testified and I was not contradicted. The employer did not reject the grievance on that date. Mr. Appell, the Business Agent, and I were told that the employer would look into the matter. Shortly thereafter, I attempted to find out from Mr. Gallagher what the Employer now intended to do. On the basis of what he said, I concluded that the employer had declined the grievance, and that he would not agree to arbitration of the new grievance. I then wrote him on December 8, 1975 as follows: (UX 7 at the arbitration)

> " Prior to preparing papers on a motion for summary judgment herein, I examined Judge Pollack's special rules with respect to motions as published in the Law Journal, and find that it is his preference that the parties arrange for a conference before preparation of papers, so that motions 'can be disposed of upon oral presentation at the conference' if possible.
>
> " You know my intentions from my letter of November 19th, namely, to discontinue as to Local 644 and to seek summary judgment directing arbitration for Local 771.
>
> " I called you Friday, and in the absence of a phone call from you today, I am writing you to let you know that it is my intention to call Judge Pollack's chambers and to propose a conference. I presume the court will furnish me with a date, of which your office will be notified in due course. "

27) Thereafter(there were many delays and postponements brought about by Mr. Gallagher's unwillingness or inability to appear) a pre-motion conference was held on January 12 at Judge Pollack's chambers, the consequences of which were reflected in the dispute submission (UX 1) quoted above (Paras. 12 and 25) and in the following letters written respectively, to the Court and to

the American Arbitration Assn., Union Exhibits 3 and 2 at the arbitration:

(Hon. Milton Pollack, United States District Court)

" As I informed you during the conference on this case this morning in Chambers, the branch of the case (first cause of action) involving plaintiff Local 644 has been effectively disposed of by the NLRB decision in which Local 644 has acquiesced without seeking judicial review. Hence it is my intention at an appropriate time to enter into a stipulation and submit an order discontinuing the action as to Local 644. An offer of such stipulation was made to the counsel for the defendant without response to date.

" However, the NLRB decision in the case which involved some of the problems presented by this civil action reserved certain matters for further disposition by other means than NLRB determination. As will be seen from page 13 of the Board's mimeographed opinion in 219 NLRB Number 185:

> ' The editing work involves two separate functions: the judgmental function of determining which material is to be retained for the program and which is to be edited out and the mechanical function of operating the technical equipment needed to edit the tape. Local 771 apparently claims the entire tape editing process, both the judgmental function and the actual operation of the videotape editing machines. The Engineers claim only the operation of the electronic videotape editing machines, and only such of the judgmental and creative function which becomes necessary in the absence of instructions from those to whom the judgmental function has been assigned. It is clear, therefore, that only that aspect of tape editing which involves the operation of the technical equipment is in dispute herein.'

" In view of the foregoing, there would be no color of defense to a motion for summary judgment compelling arbitration. However, as I stated at the conference this morning, I determined that it would be most constructive to file a demand for arbitration under the rules of the American Arbitration Association, the designating agency named in the contract with the employer. Then if the employer really has some serious basis for objecting to arbitration, it can make an appropriate motion for a restraining order.

" I think this is a constructive and sa'utory solution, and I am glad to have the Court retain jurisdiction, either for the purpose of (a) the motion to stay, if the employer actually authorizes his attorney to make such a motion, or (b) motion to confirm the award if such a motion is necessary.

" I appreciate your courtesy in making your Chambers available for the conference this morning, January 12, 1976. "

(Mr. Frank T. Zotto, American Arbitration Association)

" Enclosed herewith please find Demand for Arbitration which is being prepared and served by the undersigned because of certain pending litigation. Article XVI of the pending contract between the parties is excerpted and sent you herewith.

" There is presently pending in the Southern District of New York an action by Local 771 against the WOR Division of RKO General, Inc., Civil Action 75/906, in the Court assigned to Judge Milton Pollack. At a conference before Judge Pollack in chambers this morning it was suggested, and the Judge agreed, that at this point in the proceedings a motion for summary judgment for an order compelling arbitration could be dispensed with, since, as the Judge indicated, the AAA will process the Demand for Arbitration unless the employer makes a motion for a stay. It was the sense of the meeting that the employer is to make a motion to stay if he does not wish to arbitrate, but absent a motion to stay with a temporary restraining order preventing arbitration, the Association is to proceed to process the case.

" For the foregoing reasons, it is requested that the case be processed promptly and that there be no extensions of time granted to WOR's attorneys, who have been using dilatory tactics for several months in this matter. "

28) Only after the filing of the post-NLRB grievance with the AAA, and after the transmittal of the above letters, to which there was no reply or protest as to their accuracy or content, did the employer raise the question of alleged time bar. This was done just prior to the substitution of attorneys for defendant by a letter to the AAA written by a newly-hired labor relations em-

ployee on the employer's letterhead, January 21, 1976:

> "Please be advised that Article XV of our Collective Bargaining Agreement states: 'Arbitrations must be resolved ninety (90) days after the occurrence of the event or ninety (90) days after the Union should have had knowledge of the event.' The event which occurred which the Union is attempting to arbitrate arose early in 1975. The Union, without question, knew of the occurrence of this event, and has not filed for arbitration until now."

The writer of that letter, as a junior (new) employee of defendant, might not have known the history of the dispute nor, specifically, that the "event" described in UX 1, could only have occurred in late 1975 after post-NLRB negotiations. I responded promptly, to the AAA:

> " His point is not well taken, as he should know that an action to compel arbitration was commenced within a very short period after the occurrence of the initial event. The matter has also been the subject of continuous negotiation between me and Mr. Gallagher of counsel of record for RKO General, Inc., who did not inform me until early December of the Company's final decision following an NLRB determination.
>
> " For these reasons, the claim of non-arbitrability is patently absurd." (Emph. supp.)

29) It is evident that even if the 90 day clause could rationally be considered available to the employer after repudiation of its obligation to arbitrate, and even if a suit to compel arbitration can be rationally denied effect as a referral to arbitration, that the actual grievance so clearly could not have arisen until November 17, that the arbitrator's so-called Award must be vacated as arbitrary and capricious, and a refusal to exercise his powers, and hence an imperfect exercise of them.

30) Moreover, the constant threat and possible necessity (albeit with shifting positions by the employer as to with whom) of multilateral arbitration in the circumstances renders totally inapplicable the 90-day time bar that was framed in relation

to bilateral contract arbitration. Tripartite arbitration is not a creature of or dependent on contract, and involves circumstances not within the contract's contemplation. It is a creature of the courts, an equitable remedy fashioned by federal common law in labor relations, and no rational basis can be suggested for a holding that what would inevitably be a multi-party arbitration, first under the initial Complaint, second, as projected by defendant's Third Affirmative Defense, and third, by Mr. Batterman's statements to Mr. Schmertz, was untimely initiated.

Wherefore, plaintiff prays that the Schmertz "award" be vacated and an order made directing a hearing on the merits by a new arbitrator, mutually acceptable to the parties.

Howard N. Meyer

Sworn to before me this
21st day of May, 1976

VIRGINIA P. DENNINGTON
Notary Public, State of New York
No. 24-4515[illegible]
Qualified in Kings County
Commission Expires March 30, 197[illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOCAL 771, I.A.T.S.E., AFL-CIO

Plaintiff

- against -

RKO GENERAL, INC., WOR DIVISION

Defendant

CIVIL ACTION 75/906

JUDGE MILTON POLLACK

(MOTION RETURN DATE 6/4)

DOCUMENTS FOR THE COURT

1)	Text of NLRB Interlocutory Decision 219 NLRB No. 185	UX 6
2)	Demand for Arbitration (1/12/76) at AAA after pre-motion conference	UX 1
3)	Employer Charge filed February 1975 bringing jurisdictional dispute to NLRB	
4)	Complaint	UX 4
5)	Amended Complaint	UX 5
6)	Answer	UX 9
7)	Arbitrator's Opinion and Award refusing to pass on merits, April 12, 1976	

(10)

Exhibit 1

U#6

219 NLRB No. 185

FJP

D--294
New York, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

STAGE EMPLOYEES LOCAL ONE,
IATSE, AFL--CIO, THEATRICAL
PROTECTIVE UNION

and

MOTION PICTURE STUDIO MECHANICS
LOCAL 52, IATSE, AFL--CIO

and

INTERNATIONAL PHOTOGRAPHERS OF
THE MOTION PICTURE INDUSTRIES,
LOCAL 644, AFFILIATED WITH
IATSE, AFL--CIO

and

MOTION PICTURE FILM EDITORS,
LOCAL 771, IATSE

and

Case 2--CD--489

RKO GENERAL, WOR--TV DIVISION

and

WOR--TV ENGINEERS 1/

DECISION, ORDER, AND
DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by RKO General, WOR--TV Division, herein called the Employer, alleging that Stage Employees Local One, IATSE, AFL--CIO, Theatrical Protective Union, herein called Local One; Motion Picture

1/ The names of the parties appear as amended at the hearing.

Studio Mechanics Local 52, IATSE, AFL--CIO, herein called Local 52; International Photographers of the Motion Picture Industries, Local 644, affiliated with IATSE, AFL--CIO, herein called Local 644; and Motion Picture Film Editors, Local 771, IATSE, herein called Local 771, had violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in certain conduct with an object of forcing or requiring the Employer to assign particular work to employees represented by Local One, Local 52, Local 644, and Local 771 rather than to the Employer's engineers, herein called the Engineers.

Pursuant to notice, a hearing was held before Hearing Officer Mary W. Taylor on April 10 and 11 and May 1 and 5, 1975. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence bearing on the issues.[2/] Thereafter, all parties filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

The Board has considered the briefs and the entire record in this case and hereby makes the following findings:

2/ The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL--CIO, herein called the International, appeared at the hearing claiming to represent the Engineers.

The Engineers have no local charter and their dues are paid to the International, but they are participating in this proceeding as WOR--TV Engineers, represented by their own counsel.

I. The Business of the Employer

RKO General, WOR--TV Division, with its offices and principal place of business located at 1440 Broadway, New York, New York, owns and operates WOR--TV which broadcasts television publications to the general public in the metropolitan area of New York, which includes the States of New Jersey and Connecticut. During the past calendar year, WOR--TV received in excess of $1 million in revenues from firms located outside the State of New York for advertisement purposes and, during the same period, purchased goods, supplies, and materials valued in excess of $50,000 directly from firms located outside the State of New York.

Accordingly, we find: the Employer is an employer within the meaning of Section 2(2) of the Act; it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act; and it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organizations Involved

The parties stipulated, and we find, that Stage Employees Local One, IATSE, AFL--CIO, Theatrical Protective Union; Motion Picture Studio Mechanics Local 52, IATSE, AFL--CIO; International Photographers of the Motion Picture Industries, Local 644, affiliated with IATSE, AFL--CIO; and Motion Picture Film Editors, Local 771, IATSE, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Dispute

A. Background and Facts of the Dispute

The Employer operates a television station located in New York City and serving the metropolitan area of New York. Its primary features are old movies

and various prescheduled events, such as sports events from Shea Stadium and Madison Square Garden, parades, and entertainment shows such as the Tony awards. Prior to 1970, WOR--TV was not known as a "news-oriented" station. When news was broadcast, it was obtained primarily from a news service such as United Press International.

Since 1949, when WOR--TV first began broadcasting, it has employed Engineers to operate the large and immobile camera used for shooting predetermined events at remote locations. This "pedestal camera" is an electronic camera which reproduces an image on videotape. Initially weighing close to 300 pounds, the pedestal camera has been refined to its present weight of 90 pounds. Engineers operate the camera under the general supervision of a director, but they are responsible for capturing any events of an unpredictable nature. Upon their return to the studio, Engineers perform the technical work involved in the editing of the tape, while a member of the Directors Guild of America exercises the creative and judgmental discretion needed to put together a good program. Members of Local One provided the lighting at remote locations.

In 1970, the Employer decided to broadcast a daily, one-half hour news program. Lemuel Tucker was hired to develop a television news department. The news-gathering function required portability and mobility in order to capture fast-breaking news events, characteristics not available with the pedestal camera. To this end, the Employer purchased two hand-held 16 mm. film cameras with accompanying sound and light equipment. Members of Local 644 were hired as film cameramen; members of Local 771 were hired to edit the news film; and Local 52's members performed the required sound and lighting functions. While

in the field capturing news events on film, the camera crew, consisting of three people (including the reporter), is under the general direction of the reporter to whom the event is assigned. Engineers continued to operate the electronic pedestal camera at remote locations.

In late 1974, the Employer, apprised of new developments in electronic technology, investigated the feasibility of utilizing a new electronic camera. This "mini-cam" is a hand-held camera with accompanying backpack weighing approximately 22 pounds, and is basically a miniaturized version of the pedestal camera. In early December 1974, the Employer commenced tests with the Akai camera and accompanying videotape cassette to determine its suitability for broadcasting. Engineers performed the testing. Satisfied with the results produced by the mini-cam, the Employer purchased three such cameras. The station disposed of its two film cameras, so they are no longer available for use either as frontline equipment or as backup facilities.

The miniature electronic camera has been in limited use in the broadcasting industry for approximately 2 years, but electronic pedestal cameras have been used for over 20 years. The basic difference between the two is the size of the camera. The use of the mini-cam, in the opinion of news experts, has completely revolutionized the concept of news-gathering, and future developments are expected to lead to a highly sophisticated and sensitive camera.

The real difference between a film camera and the miniature electronic camera lies in the use of videotape. Both cameras are similar in size. With a film camera, the film must be returned to the studio and developed, then edited, and finally put on the air. Film editing involves cutting and splicing the pieces of film together, and film, once exposed to light, cannot be used

again. The use of videotape does not require the delay in processing there is with film, as tape may be transmitted immediately. Additionally, the tape is electronically edited so there are no cuts in it, and it may be erased and reused.

Furthermore, the use of a film camera requires that the sound be picked up on an external microphone which records the sound on magnetic tape. It is necessary to utilize an external amplifier with the film camera in order to keep the level of sound constant. However, the videotape camera contains a microphone built into the camera itself, which records the sound and the picture on the same tape. There is also provision for a hand-held microphone which can be plugged into the tape recorder. However, there is a circuit in the tape recorder containing an amplifier which automatically keeps the sound at a constant level.

In addition, the mini-cam is much more sensitive to light, so that not as much light is needed with it as is required with the film camera. It is not anticipated that supplemental lighting will be necessary with the mini-cam.

After the camera was tested and purchased, the Employer assigned both the operation of the camera and the operation of the tape editing equipment to Engineers, relying on their past experience with the electronic pedestal camera and on the Engineers' collective-bargaining contract. Prior to making the assignment, the Employer notified the locals of its intention to introduce the new equipment. Each local responded and claimed jurisdiction over various aspects of the new camera and its accompanying equipment. On February 21, 1975, the Employer notified members of Locals 52 and 644 and two members of Local 771

that, effective February 24, 1975, their services would no longer be needed. The sound and lighting functions formerly provided by Local 52 are integral parts of the videotape camera and no extra sound or lighting is necessary. Since the Engineers would be operating the camera, and since the film cameras had been disposed of, members of Local 644 had no work to perform. And, as the videotape is edited by electronic equipment, two film editors represented by Local 771 were no longer needed, as there is no longer any film to edit. Subsequent picketing by the locals to protest the work assignment gave rise to the present proceeding.

B. Work in Dispute

The notice of hearing states that "the dispute concerns the assignment of the work of news gathering by electronic camera for use by WOR--TV on its Daily News program." The scope of the work was enlarged at the hearing to include editing of the videotape, as well as the operation of the camera. The equipment involved is the Akai miniature electronic television camera and accompanying videotape recorder, as well as the electronic editing equipment.

C. Contentions of the Parties

The Employer assigned the disputed work to Engineers, claiming that the assignment is supported by their collective-bargaining agreement. The Employer further points to the long experience that Engineers have had in operating electronic cameras. The Engineers agree with the assignment, also citing their experience, and further claim that the assignment to them is supported by the factors of area and industry practice. The Engineers claim to possess a superior knowledge of electronics which is imperative in the operation of the camera. They further contend that they are entitled to edit the tape, as they

have always done, and cite the fact that members of Local 771 have never edited videotape at WOR--TV. Furthermore, they argue that they possess the knowledge and capability to perform a wide variety of functions, thus making it more efficient and economical for the Employer to employ them. In response to Local 644's contention that Engineers have never operated an electronic camera for the purpose of gathering news, the Engineers contend that prescheduled events are just as much news as are fast-breaking events.

Each of the local unions claims that the disputed work should be separated into its various component parts, and that its members should be assigned their traditional work. Local One has claimed jurisdiction over any supplemental lighting that may be required on location, citing its contract with the Employer as well as the fact that its members accompany Engineers to provide lighting at remote locations. Local 52 also claims the lighting function, as well as the sound function, based on the work it has performed with the film camera. Local 771 has asserted jurisdiction over the editing of the videotape on the basis of its contract and the skills possessed by its members.

Local 644 contends that its members should operate the camera, claiming that the basic functions of both the film and electronic cameras are the same---to capture an image, whether on film or on tape. It claims that its members can be trained very quickly in the technical operation of the electronic camera. It also argues that the technical operation of the camera is not nearly as important as the ability to do so in a news-gathering context, claiming that a news cameraman must have special creative abilities to function as a broadcast journalist, not merely as a technician. Local 644 argues that even though Engineers have operated an electronic camera they have not done so

in a news-gathering context, claiming that predetermined events are not of the same caliber as fast-breaking news events which have been filmed by its members.

Additionally, Locals 644 and 771 have moved to quash the notice of hearing in the present case, claiming that there is no evidence of 8(b)(4)(D) activity, and further claiming that the parties have agreed upon a method for the voluntary adjustment of the dispute.

D. Applicability of the Statute

Section 10(k) of the Act empowers the Board to determine a dispute out of which an 8(b)(4)(D) charge has arisen. However, before the Board proceeds with a determination of the dispute, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that there is no agreed-upon method, binding on all the parties, for the voluntary adjustment of the dispute.

At the hearing, counsel for Locals 644 and 771 moved to quash the notice of hearing, claiming that no jurisdictional dispute exists for the following reasons: (1) there is no evidence of 8(b)(4)(D) activity, as the picketing by the film locals was to advise the public of the Employer's actions, and was to retrieve and preserve the work previously done by the film locals; (2) the International, on behalf of the Engineers, has disclaimed any interest in the disputed work; and (3) there is an agreed-upon method for settling the dispute.[3/]

On February 3, 1975, the Employer sent a letter to Locals 52 and 644, informing them that it was considering the introduction of new equipment which

3/ The International has filed a brief in support of the motion to quash. Local 52 has also joined in the motion to quash.

might have an effect on employees represented by those locals. Locals 52 and 644 responded in writing, claiming jurisdiction over their respective work functions and suggesting that a meeting be held to discuss the matter. Local One, having heard of the impending introduction of the new camera, sent a letter to the Employer claiming jurisdiction over lighting. A meeting was held on February 18, 1975, at which all parties were represented, and at which the Employer announced that the mini-cam would soon be put into operation. Representatives of the various locals and the shop steward of the Engineers each claimed jurisdiction over various aspects of the disputed work. Although there had yet been no assignment of the work, Local One's representative threatened to take economic action if the lighting work was not assigned to members of Local One.

On February 21, 1975, the vice president and manager of WOR--TV notified members of Locals 52, 644, and 771 that their services would no longer be needed, as the work in dispute had been awarded to Engineers. On February 25, 1975, Engineers began gathering news with the electronic camera, Locals 52 and 644 began picketing, and members of Local One and 771 withheld their services. Members of Local 771 subsequently joined in the picketing. The picketing by the film locals ceased on April 4, 1975, as a result of a 10(1) injunction issued by the United States District Court for the Southern District of New York upon the application of the Board's Regional Director for Region 2.

Shortly after the picketing commenced, the Engineers' negotiating committee met with representatives of the Employer. The Engineers were asked what their position would be if the Employer, under pressure from the International,

reversed its original assignment and awarded the work to the film locals. Adrian Penner, shop steward for the Engineers, stated that his members would stop working and commence picketing.

Locals 644 and 771 claim that the picketing by their members did not give rise to a jurisdictional dispute because it was for the purpose of informing the public that their members had been locked out by the Employer, and their actions were instituted for the purpose of retrieving the jobs formerly held by their members. However, it would appear from all the evidence before us that an object of the picketing was to force assignment of the work in dispute to the members of the picketing unions. With respect to the work retrieval argument, as appears from this decision, the work in dispute relates to a new instrumentality for the gathering of news, and was not previously assigned to members of Locals 644 and 771.

It was argued at the hearing that there is no jurisdictional dispute because the International, as the collective-bargaining representative of the Engineers, has disclaimed any interest in the disputed work. However, a disclaimer is ineffective where the parties do not act in accordance with such disclaimer. Although the International argues that it has acted pursuant to the disclaimer and has not sought the disputed work herein, the Engineers have continued to claim jurisdiction over the work and have continued to perform the work. A disclaimer of interest by a union does not render the dispute moot where the individual members to whom the work was assigned continue to claim and perform the work.[4/]

4/ Local 153, International Brotherhood of Electrical Workers, AFL--CIO (Commercial Electronics, Inc.), 197 NLRB 934 (1972); Local 926, (continued)

The locals further contend that the parties have agreed upon a method for the voluntary adjustment of the dispute, citing a determination made by the International that jurisdiction over "videotape" belongs to the locals. Approximately 2 years ago at a national convention of IATSE locals, Resolution 51 was passed empowering the International to make a determination of jurisdiction over "videotape." During the next year, four hearings were held on the subject, and participation by all locals was invited. After the hearings, the International determined that jurisdiction over "videotape" at WOR—TV belonged to Locals 52, 644, and 771. These locals and the International contend that this determination bound the Engineers as well as the Employer.

The pertinent provisions of Local 771's contract with the Employer are section 3.01 and article XVIII. Section 3.01 states:

> His [TV Editor] duties shall also consist of editing and re-editing other television recordings. However, in the event another Union affiliated with the same parent body as Local 771 shall claim jurisdiction over such work, it is agreed that the matter shall be referred to the office of the International Union for its determination.

Article XVIII provides the following:

> The scope of this Agreement shall also include foregoing work functions whether made on or by film, tape or otherwise, and whether produced by means of motion picture cameras, electronic cameras or devices, tape devices or any combination of the foregoing, or any other means, methods or devices now used or which may hereafter be adopted.

The Engineers' contract provides in article II, section 2.01(a):

> It is agreed, however, that should any dispute arise between the unit covered hereby and any affiliated local of the Union in respect to conflicting jurisdictional claims

4/ International Union of Operating Engineers (High Point Sprinkler Company of Atlanta), 191 NLRB 603 (1971).

> over the editing of video tape, then and in that event such dispute shall be resolved by the General Office of the Union.

However, section 2.01(f) of the Engineers' contract provides for the following:

> The jurisdiction currently granted hereby to the Engineers hereunder with respect to the work of "tape editing" is understood and agreed not to constitute exclusive jurisdiction, except to the extent of the operation of the technical equipment used in conjunction with such "tape editing" which was heretofore and shall continue to remain the exclusive jurisdiction of Engineers.

Local 771 contends that, by virtue of these contracts, the Employer and Local 771 and the Engineers have agreed that any dispute over the jurisdiction of tape editing shall be resolved by the International, which, as already noted, has rendered a decision with respect to "videotape." However, we do not agree that the Employer has bound itself to an International determination with respect to any of the work in dispute in this case. Unfortunately, the aspect of the work in dispute which involved "editing" was not thoroughly explored at the hearing. The editing work involves two separate functions; the judgmental function of determining which material is to be retained for the program and which is to be edited out; and the mechanical function of operating the technical equipment needed to edit the tape. Local 771 apparently claims the entire tape editing process, both the judgmental function and the actual operation of the videotape editing machines. The Engineers claim only the operation of the electronic videotape editing machines, and only such of the judgmental and creative function which becomes necessary in the absence of instructions from those to whom the judgmental function has been assigned. It is clear, therefore, that only that aspect of tape editing which involves the operation of the technical equipment is in dispute herein.

That work is expressly given to the Engineers by the Engineers' contract, and that is the nature of the work which the Engineers have been performing. To the extent that the contractual provisions cited above refer to other aspects of editing as to which disputes may arise, and which are to be referred to the International for resolution, our reading of the contracts in their entirety, especially in light of testimony given at the hearing, including evidence of past practice, convinces us that the references are to the judgmental aspect of tape editing which is not in dispute herein. We therefore find that the Employer is not a party to any agreed-upon method or settlement which would abort this proceeding insofar as the editing work involved herein is concerned.

At the hearing, testimony was elicited concerning the lighting needed with the videotape camera. The camera itself is extremely sensitive to light, and it is anticipated that no supplemental lighting will be required. However, Local One has asserted jurisdiction over the future use of any lighting that "may" be needed. But, as the Employer sees no current need for lighting, it made no assignment of any lighting work. Without an assignment of the work anticipated, there can be no dispute as to who will perform the work. Therefore, the notice of hearing is quashed as to Local One.

After considering the contentions of the parties and the evidence with respect thereto, we find that the Board is not precluded from making its determination in this proceeding, that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred, and that the dispute as described above is properly before the Board for determination under Section 10(k) of the Act.

E. Merits of the Dispute

1. Collective-bargaining contracts and certifications

There are no orders or certifications of the Board awarding jurisdiction of the work in dispute to members of any of the unions involved in the present proceeding. All unions, including the International on behalf of the Engineers, presently have collective-bargaining agreements with the Employer.

The Engineers' contract provides for the following work jurisdiction in article II, section 2.01(a):

> Section 2.01. Work Jurisdiction. The work jurisdiction to be covered by this agreement shall be as follows:
> (a) The development, design, installation, operation, repair and maintenance of the Employer's technical equipment used for . . . television or facsimile broadcasting, closed-circuit operation, recording equipment (i.e., equipment for making audio and/or video recordings whether on disc, film, wire, tape or kinescope), all playback equipment including that used for the purposes of editing tape, wire or disc, all sound effects equipment . . . and, subject, to the provisions of subdivision "(d)" hereof, the work of "tape editing."

The Engineers and the Employer claim that this section, as well as section 2.03, which gives the Engineers exclusive jurisdiction over the operation of technical equipment (with some exclusions, but not excluding electronic cameras), clearly awards the operation of the camera to the Engineers. Additionally, section 17.01(f) defines the technical equipment which is to be operated by Engineers:

> The term "technical equipment" means any stationary, portable or mobile equipment used in transmitting, converting, interrupting, modifying and/or conducting audio, video, frequency modulation, amplitude modulation and facsimile playback equipment which may be used for putting programs on the air for editing purposes, and/or any other equipment, both audio and video. . . .

With regard to the operation of the camera, Local 644 contends that its contract supports an award to its members. The language of section 1(a) covers cameramen who do the work of "photographing newsreels, factual and documentary films." Section 13(d) lists the work of such cameramen:

> The work of motion picture film cameramen and assistant cameramen shall include not only the operation of all equipment and apparatus used in connection with or as auxiliary to the shooting of such motion pictures, but also the handling of any such equipment or apparatus.

However, the Employer points to an introductory paragraph in Local 644's contract in support of its contention that the work of Local 644's members is strictly limited to film. That paragraph reads as follows:

> WHEREAS, the Station is engaged in the making of newsreels, documentary and factual films, and utilizes in such business the services of motion picture film cameramen covered by the terms of this agreement . . . . [Emphasis supplied.]

We believe that the contracts of the Engineers and of Local 644 clearly define and delineate the jurisdiction of the respective unions, and that the Engineers' contract favors the assignment of operating the camera to the Engineers.

With regard to the editing of the videotape, we have already made it clear that the only issue involved is the operation of the technical equipment. The Employer and Engineers claim that the Engineers' contract clearly mandates that the operation of the technical equipment used in tape editing should be performed by Engineers, whereas Local 771 relies on its contract to support its claim. We have already set forth the pertinent contractual provisions and our belief that the Engineers' contract assigns to the Engineers exclusive jurisdiction over the operation of the technical equipment.

Local 52 claims that the operation of the sound equipment should be assigned to its members, relying on section 1.01 of its contract which cover "all persons who perform services in the shooting of newsreel, documentary film employed in the categories of Electrician or Soundman." However, other provisions in Local 52's contract deal only with motion picture film and film other than newsreel. We find that its contract appears to be limited to supplying sound functions only when film is used.

2. Area, craft, and industry practice

The electronic mini-cam is not yet in widespread use in the broadcasting industry, and many stations are still experimenting with its use. The three national networks (ABC, CBS, NBC) have all utilized the miniature version of the electronic camera for news-gathering purposes. Each network has five owned and operated television stations throughout the country which are now using the mini-cam. Additionally, station WPIX and Channel 67 in New York are using the new camera. Richard Quodomine, chief engineer at WOR--TV, testified that at each and every station in the New York metropolitan area which is now utilizing the mini-cam, as well as at the owned and operated stations of the national networks, the operation of the camera has been assigned to employees represented by an engineering unit.

William Horgan, business representative of Local 644, testified that members of his union operate the electronic camera at a Westinghouse station in Baltimore, and at Television News, Inc., which supplies news to television stations.

While industry practice is not conclusive, the fact that the three national networks have assigned the operation of the camera and its auxiliary equipment

to an engineering unit is regarded by us as a factor favoring an assignment to the Engineers.

3. Job impact

When the Employer decided to utilize the electronic camera and tape editing equipment, and to assign the work to the Engineers, eight positions were eliminated: two news film cameramen represented by Local 644; two news editors represented by Local 771; and four news electricians and soundmen represented by Local 52 were informed that their services were no longer required. Although film cameramen and soundmen are no longer needed as the Employer has disposed of its film cameras and sees no need for extra lighting, the record revealed that film editors are still required in order to edit the movies broadcast by the Employer. The Employer has not increased the number of Engineers employed by it, but has assigned three of the unit members to perform the new work. The Employer expects to train and use a pool of 15 Engineers to perform the work. Richard Quodomine testified that three Engineers would lose their jobs if the work were assigned to members of the other locals.

4. Economy and efficiency

The broadcasting industry, as a whole, and the Employer, in particular, are satisfied with the results of the mini-camera because of its compactness, its efficiency, the economy of operation which results from its use, and the immediacy with which news can be gathered. The operation of a film camera required a mandatory three-man crew: the film cameraman, the sound and light man, and the reporter assigned to the event. Additionally, the film itself was edited by yet another person.

The use of the elctronic camera has produced a marked change in efficiency of operations. An important factor in this result is the high degree of integration of all functions of the electronic camera as compared to the film camera. Several pieces of auxiliary and supplemental equipment were absolutely necessary when the film camera was used. Extra lighting was needed to produce a high quality film. Sound equipment consisting of a microphone and amplifier was also required. There is no such mandatory supplemental equipment needed with the electronic camera. The camera is extremely sensitive to light, and there is anticipated no need for supplemental lighting. The camera itself also includes a built-in microphone to pick up the sound. Both the sound and the image are recorded on a tape contained in the videotape cassette recorder, which is carried by the cameraman by means of a shoulder strap.

Richard Quodomine testified that the engineer operating the camera can gather news by himself; he can take a program and perform all the required functions from inception to conclusion. The engineer can shoot the tape, arrange all the equipment, edit and air the tape, and maintain the equipment. Locals 644 and 771 claim that the "one-man" theory does not hold up when it is considered that at least two pieces of equipment are used---the camera and the videotape editing equipment. While the Employer acknowledged that an engineer other than the engineer assigned to shoot the event will probably edit the tape, it was stressed that all Engineers possess the knowledge and capability to perform the tape editing.

Furthermore, the Engineers' unit is able to perform a wide variety of functions other than operating the camera and editing the tape. Engineers perform all the functions relating to the recording and playing back of all

television shows. Engineers, if they have no particular news event to which they have been assigned, can be assigned to projection work; to record and play back programs; and to edit, view, and time programs. In addition, Engineers can be sent to the studio where they perform camera, audio, and switching work. Furthermore, since Engineers are assigned to work 24 hours a day, 7 days a week, the Employer has great flexibility and gains the potential of gathering news at any time.

We conclude, therefore, that the factors of economy and efficiency favor an assignment of the disputed work, including the tape editing, to the Engineers.

5. Skills

The operation of the electronic camera in a news-gathering context requires the possession of two separate and distinct skills: the technological skill and knowledge of electronics to perform the functional operation of the camera and the esthetic and creative skills to put together a good story.

There is no question but that the Engineers possess the requisite technological skills. For over 20 years they have operated electronic cameras for the Employer. Their thorough knowledge of electronics is the main reason why the Employer assigned the work to them. The salesman for the Akai camera indicated that the most important skill necessary was a complete knowledge of electronics. Local 644 stresses the ease with which its members could learn how to operate the camera, citing a statement in the Akai sales brochure that the camera "features simple operation so that it does not take a video expert to make a professional color recording." The Employer acknowledges that the film cameramen could readily be trained in the use of the electronic camera.

However, a very important consideration in the Employer's assignment is the fact that the camera is extremely sensitive, and adjustments are necessary for its proper operation. The operator of the camera must possess full knowledge of his equipment so that he can prepare or fix it on the spot while he is out in the field. He must know how to register the camera; balance the color; adjust levels of color intensity and linearity; and measure and time the impulses according to Federal Communication Commission regulations. While the basic operation of the camera may not be complex, the sophistication of the camera requires more than merely functional skills.

All the technical skills come through experience and proper training, which Engineers have had. While the operation of the electronic camera is similar to the operation of the film camera, the film cameramen have had no experience in electronics, no experience with adjusting color levels (color levels on film are adjusted in the processing lab), and no experience with the sensitivity of the electronic equipment.

Local 644 places great emphasis not on the technical skills needed, but on the creative and judgmental abilities which a good cameraman should possess. It claims that Engineers have never operated an electronic camera in a true news-gathering context, contending that there is a great deal of difference between the prescheduled events assigned to the Engineers and the fast breaking, more newsworthy events shot by its members. Local 644 argues that Engineers do not possess the abilities needed to make a good "photo journalist" instead of merely a technician. A great deal of time was spent at the hearing describing the creative qualities needed for news gathering, including a knowledge of picture composition, imagination, the ability to be quick and accurate in

following fast action, and the ability to work independently of a reporter if necessary.

Local 644 claims that the Engineers do not possess any of the above-cited capabilities and further states that the Board has previously recognized that "the determinative consideration is not simply the ability to operate the electronic camera, but the ability to do so in a news-gathering context."[5/] However, this argument ignores the fact that Engineers have been gathering news, albeit of a different genre, for many years. While the events to which Engineers have been assigned are predetermined and are in many ways of a predictable nature, nonetheless, Engineers must possess the same judgmental skills as a film cameraman shooting the more traditional news story. Furthermore, Engineers are often called upon to capture unplanned and spontaneous events, and are often required to work independently of either a director or reporter.

We believe that Local 644's reliance on the King case in support of its contention that only its members possess photojournalist abilities is misplaced. For the evidence quite clearly indicates that Engineers, as well as Local 644's members, are experienced in the news-gathering function. The present dispute thus involves an entirely different situation than was present in King, where members of only one group possessed the requisite news-gathering and creative skills. Here, both groups are able to operate a camera in a news-gathering context, but, even assuming that both groups are able to perform the technical operation of the camera, it is quite clear that Engineers possess a superior all-around knowledge of electronics not possessed nor claimed by the film

5/ International Photographers Local 659 (King Broadcasting Company), 216 NLRB No. 164 (1975).

cameramen of Local 644. For that reason, a comparison of the relative skills favors an award of the operation of the camera to Engineers.

With respect to the editing of the videotape, Local 771 claims that its members are far more skilled and further contends that the judgmental skills are more important than are the technical skills. This argument loses its force, however, when it is once again pointed out that the dispute concerns only the technical operation of the electronic machines used to edit the tape. The record clearly indicates that members of Local 771 have never edited tape at WOR--TV. Local 771 furthermore did not claim that its members could be trained to operate the electronic editing equipment. The techniques for editing film and tape are quite different. Engineers have always edited tape for the Employer, tape which they have produced from their operation of the electronic pedestal camera and tape obtained from news services. Local 771's experience and skills are strictly limited to film. We conclude, therefore, that the skills and experience of the Engineers favor an award of the work to them.

6. Employer preference

After a consideration of all the relevant factors, the Employer assigned the work of operating the Akai camera and editing the videotape produced by such camera to the Engineers. The record indicates that the Employer is satisfied with the results of the assignment and maintains a preference for an assignment of the work to the Engineers.

Conclusion

Upon the record as a whole, and after full consideration of all the relevant factors involved, we conclude that the Engineers are entitled to the disputed work and we shall determine the dispute in their favor. Where Engineers

have traditionally operated an electronic camera and edited tape; where skills, economy and efficiency, and contract favor an assignment of work to the Engineers; where industry practice, though not conclusive, favors such an assignment; and where the Employer is satisfied with and continues to prefer the assignment, we must conclude that an assignment of the work to the Engineers is warranted.

In making this determination, we are assigning the disputed work to Engineers employed by the Employer and represented by the International, but not to the International or its members. Our present determination is limited to the particular dispute which gave rise to this proceeding.

ORDER

It is hereby ordered that the notice of hearing issued in this proceeding with respect to Stage Employees Local One, IATSE, AFL—CIO, Theatrical Protective Union, be, and it hereby is, quashed.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following Determination of Dispute:

1. Engineers employed by the Employer, RKO General, WOR—TV Division, and represented by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL—CIO, are entitled to perform the work of news gathering by use of the Akai electronic camera and accompanying videotape cassette recorder, and to perform the work of operating the electronic equipment used to edit videotape for use by the

Employer on its Daily News program, at the Employer's facilities located at 1440 Broadway, New York, New York.

2. Motion Picture Studio Mechanics Local 52, IATSE, AFL--CIO; International Photographers of the Motion Picture Industries, Local 644, affiliated with IATSE, AFL--CIO; and Motion Picture Film Editors, Local 771, IATSE, are not entitled, by means proscribed by Section 8(b)(4)(D) of the Act, to force or require RKO General, WOR--TV Division, to assign any such disputed work to soundmen and electricians, film cameramen, or TV editors who are represented by their respective labor organizations.

3. Within 10 days from the date of this Decision and Determination, Locals 52, 644, and 771 shall notify the Regional Director for Region 2, in writing, whether they will refrain from forcing or requiring the Employer, by means proscribed in Section 8(b)(4)(D), to assign the work in dispute to employees represented by Locals 52, 644, and 771, rather than to the Employer's Engineers represented by the International.

Dated, Washington, D.C. AUG 18 1975

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Exhibit 3 RECEIVED FEB 27 5:45 pm

FORM NLRB-508 (4-73)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved
O.M.B. No. 64-R0003

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 2-CD- 1187

Date Filed February 27, 1975

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to Contact	c. Phone No.
International Alliance of Theatrical Stage Employees and its Constituent Locals: One; 52; 644 771; and Engineers	See attatched list A	See att. list

d. Address (Street, city, State and ZIP code)
See attatched list

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (4) (i) and (ii) (B) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about February 25, 1975, and at all times thereafter, the above-named labor organization, by their officers, agents and representatives, engaged in, or induced or encouraged the employees of Stations WOR-TV at 1481 Broadway and WOR-FM, WXLO and the RKO General Headquarters at 1440 Broadway, all in New York, New York, to engage in a strike or concerted refusal in the course of their employment to use manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is to force or require WOR-TV, a division of General to assign the work listed in appendix B to employees who are members of and represented by the respective above-mentioned labor organizations rather than to employees who are member of I.A.T.S.E. Engineers , all in violation of Section 8(b) (4) (i) and (ii) (B) of the National Labor Relationa Act.

3. Name of Employer	4. Phone No.
RKO General, WOR-TV	764-6892
5. Location of Plant Involved (Street, city, State and ZIP code)	**6. Employer Representative to Contact**
1440 Broadway, New York, N.Y. 10018 1481 Broadway, New York, N.Y. 10036	Robert J. Williamson

7. Type of Establishment (Factory, mine, wholesaler, etc.)	8. Identify Principal Product or Service	9. No. of Workers Employed
Television Station	Broadcasting	

10. Full Name of Party Filing Charge
Robert J. Williamson- Vice-President & Manager

11. Address of Party Filing Charge (Street, city, State and ZIP code)	12. Telephone No.
1440 Broadway, New York, N.Y. 100	764-6892

DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Robert J. Williamson — Vice-President
(Signature of representative or person making charge) (Title or office, if any)

/s/Robert J. Williamson
Address 1440 Broadway, N.Y., N.Y. — 764-6892 (Telephone number) — February 27, 1975 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 863-327

= Appendix A

1) International Alliance of Theatrical Stage Employees
Walter F. Diehl, International President
1270 Avenue of the Americas
New York, N.Y. CI 5-4369

2) I.A.T.S.E., Local One - Stagehands, Lighting
c/o Mr. Vincent Jacobi, Jr.
254 West 54th Street
New York, N.Y. 10019 265 - 2408

3) I.A.T.S.E., Local 52 - Soundmen and Electricians
c/o Mr. Michael Proscia
Business Manager
250 West 57th Street
New York, N.Y. 10019 765 - 0741

4) I.A.T.S.E., Local 644 - Cameramen
c/o Mr. William Horgan
Business Agent
250 West 57th Street
New York, N.Y. 10019 CI 7 - 3860

5) I.A.T.S.E., Local 771 - Film Editors
c/o Mr. Joel Appell
Business Agent
630 Ninth Avenue
New York, N.Y. 10036 JU 2 - 3728

6) I.A.T.S.E., - Engineers
c/o Mr. John J. Francavilla
International Representative
1270 Avenue of the Americas
New York, N.Y. 10020 CI 5 - 4369

Appendix B

1: News Gathering (electronic Camera)

A) ~~Lighting~~ CAMERA ---------- Claimed by Local 644 and Engineers

B) Lighting---------- Claimed by Local One, Local 52 and Engineers

C) Sound---------- Claimed by Local 52 and Engineers

2: Tape Editing ----------V Claimed by Local 771 and Engineers

Exhibit 4

#4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LOCAL 644, I.A.T.S.E., AFL-CIO and
LOCAL 771, I.A.T.S.E., AFL-CIO,

Plaintiffs

- against -

RKO GENERAL, INC., WOR DIVISION
and INTERNATIONAL ALLIANCE OF
THEATRICAL AND STAGE EMPLOYEES,

Defendants

----------x

COMPLAINT

CIVIL ACTION #

Plaintiffs for their complaint herein allege:

1) Jurisdiction of Plaintiffs' action is conferred on this Court by Section 301 of the Labor-Management Relations Act of 1947 as amended (29 U.S.C. 185).

2) This is an action for a declaratory judgment, pursuant to 28 U.S.C. Sec. 2201 for the purpose of determining a question of actual controversy between the parties, as well as an action to enforce contracts between an employer and a labor organization in an industry affecting commerce and between such labor organizations, in which affirmative relief as well as damages will be sought.

3) Plaintiffs Local 644 and Local 771 are labor organizations representing employees in an industry affecting commerce and are both affiliated as Local Unions with the International Alliance of Theatrical and Stage Employees, defendant herein, commonly referred to as IATSE and hereinafter referred to as "International Union," which is also a labor organization representing employees in an industry affecting commerce.

4) Defendant RKO General, Inc., WOR Division, (referred to as "Employer" herein) is on information and belief a Delaware corporation with its principal place of business in New York City, and is engaged in commerce within the meaning of the Labor-Management Relations Act.

FOR A FIRST CAUSE OF ACTION IN BEHALF OF LOCAL 644
AGAINST DEFENDANTS

5) At all relevant times the defendant Employer has recognized plaintiff Local 644 as the sole and exclusive bargaining representative for newsreel cameramen employed by it in connection with its business as a television broadcaster.

6) By collective bargaining agreement by and between Local 644 and Employer "all cameramen in the employ of the station" are required to be or become members of Local 644, and said collective bargaining agreement has, for many years, established the terms and conditions of cameramen employed by defendant.

7) By contract and agreement between plaintiff and defendant International Union there has been conferred on plaintiff Local 644 sole jurisdiction to organize and represent moving picture cameramen including specifically "television cameramen " and implicit in such grant of sole jurisdiction is an obligation fairly to represent and defend plaintiff Local 644 and the rights of its members in respect of any matter involving employment of television cameramen in New York City.

8)In or about late 1974 or early 1975 defendant WOR Division acquired a number of additional television cameras. Said cameras were in function and in purpose identical to cameras theretofore employed in the production of newsreels by defendant Employer and produced moving pictures requiring editing in the same fashion as newsreel motion picture cameras previously acquired, save to the extent that the editing thereof was to be performed on videotape instead of motion picture film.

9) Defendant International Union has organized a so-called Radio and Television Department consisting of employees who are not assigned to or members of any local union within said defendant but are direct members of said International Union.

10) Said International Union in behalf of its direct members as aforesaid has entered into a collective bargaining agreement with defendant Employer which specifically provides, among other things, that "nothing contained herein shall be construed as a claim to work which is already under contract to another union" and which also provides "this agreement shall not include any of the following employees of the employer ... classification of employees covered by the collective bargaining agreements between the employer and affiliated locals of the union."

11) The Employer defendant has threatened to and taken action to discharge the cameramen employed by it who have been represented by Local 644 and replace them with employees who are or will be members of said International Union's Radio and Television Department in violation of its collective bargaining agreement with plaintiff Local 644.

12) Said actions by the Employer have been condoned and acquiesced in by defendant International Union, in violation of its contractual obligations to plaintiff local unions and duty fairly to represent them.

13) The collective agreement between plaintiff Local 644 and WOR Division contains no arbitration clause covering this dispute.

14) Plaintiff Local 644 herein is entitled to a declaration and adjudication that defendant Employer is under an obligation to continue to hire and employ cameramen solely under said collective agreement with plaintiff Local 644 to function as described under said agreement, and directing that defendant International Union shall not interfere therewith, and for appropriate affirmative and injunctive relief and damages.

FOR A SECOND CAUSE OF ACTION IN BEHALF OF PLAINTIFF LOCAL 771 AND AGAINST DEFENDANTS

15) Plaintiff Local 771 repeats and re-alleges paragraphs 1,2, 3,4,8, and 10 above.

16) The collective agreement between Plaintiff Local 771 and Defendant Employer is with respect to the work function of editing motion pictures and said agreement specifically provides that "the scope of this agreement shall also include the foregoing work functions, whether made on or by film, tape,or otherwise, and whether produced by means of motion picture cameras, electronic cameras, or other devices, tape devices, or any combination of the foregoing..."

17) Said agreement further provides that the parties may submit to arbitration, in accordance with the rules of the American Arbitration Association, upon written request of either party, any complaints disputes or grievances involving questions of interpretation or application of any clause or matter covered by said agreement.

18) The collective agreement between defendant International Union and Defendant WOR Division likewise provides for arbitration of any dispute between the parties thereto under the rules of the American Arbitration Association.

19) Despite and in violation of its contractual obligations as alleged in paragraph 16 hereof and the express limitation described in paragraph 10 hereof, the Employer has unilaterally announced that it proposed to permit members of Defendant International Union's Radio and Television Department to perform the function of motion picture editing on newsreels produced by the cameras referred to in paragraph 8 hereof, and to discharge members of Plaintiff Local 771, and has been condoned in doing so by Defendant International Union, in violation of said International Union's obligation to plaintiff.

20) Since the plaintiff is not a party to the arbitration agreement between the defendants and since defendant International Union is not a party to the agreement between plaintiff and defendant Employer, a separate arbitration between either pair of parties cannot adequately and sufficiently and fairly make a determination

of the rights and relations of the parties.

21) Because it is necessary, in order to do full justice among the parties, to consider the scope and effect of the relevant related collective bargaining agreements and other relations among all parties, the District Court has the jurisdiction and power to order a joint arbitration among Plaintiff Local 771, Defendant International Union and Defendant Employer with respect to the matters in dispute herein, relating to the editing of newsreels and the threatened intention of defendant Employer, with the connivance of defendant International Union, to employ persons not represented by Local 771 to perform editing of newsreels on the new cameras heretofore referred to herein, and, pending such arbitration, to grant appropriate affirmative or injunctive relief.

22)Plaintiffs do not have a plain, adequate and speedy remedy at law.

WHEREFORE, Plaintiffs respectfully pray that this Court:

1) Adjudge that the Defendant employer is obligated to employ cameramen to operate all of its cameras for the purpose of photographing and broadcasting news events and other motion pictures who shall be governed as to terms and conditions of employment by the collective agreement between said Defendant and Plaintiff Local 644.

2) Direct that there be a consolidated arbitration of the dispute between Local 771 and WOR wherein the rights and obligations of Defendant International Union with respect to Defendant Employer and Plaintiff Local 771 may be respectively determined.

3) Provide appropriate equitable relief directing defendants to act in compliance with their agreements with Plaintiffs and to refrain from acting collusively or in concert or otherwise to prejudice plaintiffs' rights herein.

4) Grant such other and further relief as to the Court may seem just and proper, including reinstatement with back pay of any employees dismissed as a result of defendants' actions and damages including counsel fees, together with the costs of this action.

February 21, 1975

HOWARD N. MEYER
Attorney for Plaintiffs
270 Madison Avenue
New York 10016,N.Y.
212-685-9800

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LOCAL 771, I.A.T.S.E., AFL-CIO, :

Plaintiff, :

v. : 75 Civ. 906 (MP)

RKO GENERAL, INC., WOR DIVISION, :

Defendant. :

----------x

OPINION

APPEARANCES:

HOWARD N MEYER, ESQ.
Attorney for the Plaintiff
270 Madison Avenue
New York, N.Y. 10016

PROSKAUER, ROSE, GOETZ & MENDELSOHN
Attorneys for Defendant
300 Park Avenue
New York, N.Y. 10022
By: L. Robert Batterman, Esq.,
Franklin S. Bonem, Esq. and
Jonathan L. Sulds, Esq.

MILTON POLLACK, District Judge.

Milton Pollack, District Judge.

The employer (sometimes "the Company" hereafter) seeks to confirm and the Union (sometimes "Local 771" hereafter) on behalf of employees seeks to vacate an arbitrator's Award declaring that a labor dispute submitted for arbitration pursuant to the collective bargaining agreement between the parties is no longer arbitrable because it is time barred under the limitary provision of that agreement.

The controversy started out as a lawsuit before the Court filed on February 21, 1975 based on Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 and 28 U.S.C. § 2201 in which part of the relief sought by the Union plaintiff was to compel the employer defendant to arbitrate the labor dispute in question. No actual demand for arbitration, other than that contained in the complaint herein, was theretofore ever made by the Union.

On January 12, 1976, the Union, for the first time, made a formal demand for arbitration of the labor dispute in question, in conformance with the rules of the American Arbitration Association incorporated in the collective bargaining agreement between the Union and the Employer.

Pursuant to that demand the American Arbitration Association took jurisdiction and appointed an Arbitrator and the parties proceeded before him. The Employer's answer before the American Arbitration Association asserted that arbitration was time barred under the terms of the agreement for arbitration contained in the collective bargaining agreement.

On April 9, 1976 the arbitrator, Eric Schmertz, rendered the award that is the subject of these motions. Setting the relevant "event" which triggered the running of the contractual limitary period at or about February 21, 1975, Schmertz decided that the contractually-required demand for arbitration was not filed within the requisite ninety days and, therefore, the dispute was not arbitrable. He noted the ambiguity of the clause of the agreement which articulates the ninety day rule but reasoned that if that clause (Article 15.02) doesn't require the filing and completion of arbitration within ninety days it at least required filing within that period. The filing of this action cannot be deemed a sufficient demand and no

action taken by the Company during the pendency of this action constituted a waiver of the ninety day rule, according to the arbitrator.

The Union, seeking to vacate this Award, contends that the filing of this suit demanding arbitration relief satisfied the timeliness requirement of the arbitration agreement and that the Employer's course of action tolled the limitary period provided by the arbitration agreement and estops the Employer from asserting untimeliness of demand.

For the reasons set out hereafter the motion to confirm the Award is granted and the cross-motion to vacate the Award is accordingly denied.

I.

The defendant herein ("the Company"), is a division of RKO General which owns and operates a New York City television station, and moves pursuant to 9 U.S.C. §§ 9 and 13 to confirm the arbitrator's findings that the dispute herein is not arbitrable because of plaintiff's failure to make a timely demand for arbitration. The Company has its principal place of business in New York but does

sufficient out-of-state business to qualify as an "employer ... engaged in commerce" under 29 U.S.C. §§ 152(2), (6) and (7).

The substantive dispute between the parties arises out of the Company's work assignments in connection with the operation of its new "mini-cam" television cameras.

Originally there were two plaintiffs in this suit, two local unions representing certain of the Company's employees who claim the right to perform specific functions related to the use of this new camera. Local 644 of the International Photographers of the Motion Pictures, the plaintiff union which represents those employees who claimed but were denied the right to actually operate the new camera, was dismissed from the suit by stipulation on March 12, 1976.

The remaining plaintiff, Local 771 of the Motion Picture Film Editors ("Local 771"), represents present and former employees who claim the right to edit the videotape produced by the mini-cam. It, like Local 644, is affiliated with the International Alliance of Theatrical State Employees and Moving Picture Machine Operators, AFL-CIO

(hereafter "the International") and represents employees in an industry affecting commerce within the meaning of 29 U.S.C. §§ 152(3), (4). Local 771 moves to vacate the arbitrator's award pursuant to 9 U.S.C. § 10.

The History of the Dispute

In 1970 the Company, whose television station was not known as a particularly "news-oriented" station, decided for the first time to broadcast a daily, one-half hour news program. As a result, it purchased two hand-held 16 mm. film cameras for newsgathering and hired members of Local 664 as film cameramen and members of Local 771 as news film editors. In addition, members of another union also affiliated with the International (Local 52 of the Motion Picture Mechanics) were hired to handle the light and sound equipment used along with the film cameras. 1/

1/ Local 52, which is not a party to this action, has brought an independent action in this Court seeking essentially the same relief as is sought herein. Moshlak v. RKO, Dkt. No. 75-877.

In late 1974, the Company removed its film cameras from its newsgathering operations and procured two new "mini-cam" television cameras which produce videotape directly rather than ordinary film. Before assigning the various aspects of the work involved in the use of this new device, the Company notified the local unions of its decision to introduce the new equipment. Each local claimed jurisdiction under its collective bargaining agreement over some aspect of the mini-cam work.

However, on February 21, 1975 the Company announced its decision to assign all of that work to its Radio and Television Department (the "R & T Unit" or "the Engineers"), the employees of which are represented by the International but no member of which is represented by any of the above-mentioned local unions. All the members of Locals 52 and 644 working for the Company and two members of Local 771 were notified of their termination.

On the same day as the Company's announcement, Locals 644 and 771 filed this suit. Their initial complaint sought (1) a declaratory judgment that the Company was under a contractual obligation to employ members of Local 644

to perform the functions set out in their collective bargaining agreement; (2) an order compelling a multilateral arbitration of the work assignment dispute over the editing, which arbitration would include Local 771, the Company and the International (which was named as a defendant along with the Company); (3) an order granting "appropriate equitable relief" directing defendants to act in compliance with their agreements with plaintiffs; and (4) "such other and further relief as to the Court may seem just and proper."

However, only a few days after this initial filing, the plaintiffs submitted an amended complaint which dropped the International as a defendant and substituted a claim for bilateral arbitration between Local 771 and the Company for the initial request for multilateral arbitration. This amendment was apparently made in reliance on the International's alleged representation that it would not challenge the three local unions' claim to the mini-cam work.
(See ¶ 10 of the amended complaint.)

Local 771's general claim is that under their collective bargaining agreement with the Company (hereafter "the Agreement") its members have a right to perform the

image editing work. It cites the following language from the Agreement's Article XVIII:

> The scope of this Agreement shall include all Film Editors, TV Editors and Assistant TV Editors, and Editing Room Assistants. All employees engaged in the re-editing and/or cutting and/or assembling of positive film prints and/or negative film. [sic] Music Film Tracks and Sound Effects Tracks are covered by this Agreement.
>
> The scope of this Agreement shall also include foregoing work functions [sic] whether made on or by film, tape or otherwise, and whether produced by means of motion picture cameras, electronic cameras or devices, tape devices or any combination of the foregoing, or any other means, methods or devices now used or which may hereafter be adopted. [emphasis added]

Article XV of the Agreement between Local 771 and the Company provides that disputes between the signatories will be subject to a grievance procedure set out in that Article[2/] and "no other matters shall be subject to arbitration." It also provides that "[a]rbitration must be resolved ninety (90) days after the occurance [sic] of the event or ninety (90) days after the Union should have had knowledge of the event."

2/ The record does not indicate whether or not the grievance procedures enumerated in the Agreement have been strictly complied with. However, in light of the result reached herein, the Court need not reach that issue. Cf. infra.

Under the Article on arbitration (Article XVI of the agreement between the parties)

> [t]he parties may submit to arbitration in accordance with the rules of the American Arbitration Association upon written request of either party, provided, however, that by mutual agreement the parties may agree to the selection of an arbitrator through other than the regular American Arbitration Association selection process.3/

No actual demand for arbitration, other than that contained in the complaint herein, was made by Local 771 in this period in early 1975.

3/ The remainder of this arbitration Article reads as follows:

16.02 The Arbitrator shall consider each case solely on its merits and this Agreement shall constitute the basis upon which the decision shall be rendered. The arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this Agreement.

16.03 The decision of the Arbitrator shall be binding upon both parties for the duration of this Agreement.

16.04 Should any party fail, upon written notice, to appear before the Arbitrator in any matter submitted for arbitration as herein provided, the Arbitrator may proceed with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

16.05 The Arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties.

At about the time of the filing of the complaint in this action, Locals 52 and 644 set up picket lines in protest to the Company's work assignment actions. These picket lines were honored by members of Local 771 (some of whose members still did and still do perform film editing work on non-news related portions of the Company's operations).

As a response to this picketing, the Company filed unfair labor practice charges against the Local Unions with the National Labor Relations Board (NLRB). It asserted that those Unions had violated sections 8(b)(4)(i) and 8(b)(4)(ii)(D) of the National Labor Relations Act (NLRA). The Company also filed its answer to the complaint in this action, asserting as affirmative defenses the claims that the NLRB had primary jurisdiction of the case, that the complaint failed to state a claim on which relief could be granted, and that plaintiffs had failed to join indispensable parties pursuant to Rule 19(a), Fed. R. Civ. P.

A preliminary injunction against the picketing was sought by the Company and granted by Judge Brieant of this Court on April 10, 1975, the same day that the NLRB began

hearings on the dispute pursuant to § 10(k) of the NLRA.

On August 18, 1975 the NLRB rendered a decision upholding the Company's work assignments in their entirety. However, in that decision the Board distinguished between two allegedly distinct portions of newsfilm or videotape editing. It observed that such editing involves both the actual operation of the editing machine and the exercise of creative judgment as to the content of the final portion. Since the Engineers claimed only the right to work the editing machines and perform just so much of the judgmental work as is inherent in the operation of those machines, the Board made its decision applicable only to that portion of the image editing work. No decision was rendered on the strictly creative portion of the editing work.

In October of 1975, the Board issued an unfair labor practice complaint against the Unions and, after those Unions acquiesced in the Board's decision, it relinquished jurisdiction on November 28, 1975.

After negotiations between Local 771 and the Company over the judgmental aspect of the editing work broke down, Local 771 sought arbitration of the dispute. 4/

4/ Section 7 of the Rules of the American Arbitration Association, entitled "Initiation Under an Arbitration Provision in a Contract," provides that

> [a]rbitration under an arbitration provision in a contract may be initiated in the following manner:
>
> (a) The initiating party may give notice to the other party of his intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought, and
>
> (b) By filing at any Regional Office of the AAA two (2) copies of said notice, together with two (2) copies of the arbitration provisions of the contract, together with the appropriate administrative fee as provided in the Administrative Fee Schedule.
>
> The AAA shall give notice of such filing to the other party. If he so desires, the party upon whom the demand for arbitration is made may file an answering statement in duplicate with the AAA within seven days after notice from the AAA, in which event he shall simultaneously send a copy of his answer to the other party. If a monetary claim is made in the answer the appropriate fee provided in the Fee Schedule shall be forwarded to the AAA with the answer. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

II.

The Legal Standards and Arguments

The bounds of judicial review of an arbitrator's award in a labor dispute have been narrowly drawn by the Supreme Court, United Steelworkers v. American Manufacturing Co., 363 U.S. 564, 567-8 (1960), and, unlike questions of substantive arbitrability,[5/] questions of procedural arbitrability (such as that involved in this case) are to be decided by the arbitrator rather than the courts, John Wiley & Sons v. Livingston, 376 U.S. 543, 557 (1964). Where, as here, the only apparent grounds for vacating an arbitrator's award are those enumerated in 9 U.S.C. § 10(d), that award must stand absent a sufficient showing that the arbitrator "exceeded his powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made." Vacatur is possible under this section only if the arbitrator's decision is fundamentally irrational, Swift Industries Inc. v. Botany Industries Inc., 466 F.2d 1125 (3d Cir. 1972), does not draw its essence from the contract between the parties, United

5/ See Gangemi v. General Electric Co., 532 F.2d 861 (2d Cir. 1976).

Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) or constitutes a manifest disregard of the law, Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972). The fact that the arbitrator's expressed reasoning may not be entirely satisfactory or that he may have made a single mistaken interpretation of the law will not alone support vacatur.

Local 771 wages a multi-faceted attack on the arbitrator's award in the general effort to demonstrate that it is "arbitrary and capricious." It appears to be making basically five arguments: (1) that the Company has consistently advocated multi-lateral arbitration, which is governed by federal common law rather than the portion of the agreement which contains the ninety day rule and contemplates only bi-lateral arbitration; (2) that the filing of this case within ninety days of the Company's work assignment decision satisfied the contractual ninety day rule; (3) that the ninety day limitary period was tolled by the Company's referral of the dispute to the NLRB; (4) that the Company's alleged consistent refusal to arbitrate estops it from asserting the ninety day rule;

and (5) that the arbitration sought was really over a dispute that arose only after negotiations between the Company and Local over the creative editing work broke down in November of 1975 (less than ninety days before the filing of the formal demand for arbitration).

Though it is true that the courts have the power to order multi-lateral arbitrations in certain cases, Columbia Broadcasting System, Inc. v. American Record and Broadcasting Assn., 414 F.2d 1326 (2d Cir. 1969), and may have the additional power to overlook procedural requirements in relevant bilateral arbitration agreements, cf. Local No. 552 v. Hydraulic Press Brick Co., 371 F. Supp. 818, 825 (S.D. Mo. 1974), the fact is that Local 771 itself demanded bilateral arbitration in this case and, therefore, the resulting arbitral proceedings must be governed by the bilateral arbitration agreement between the parties. Accordingly, this part of Local 771's attack on the award falls away and the propriety of the award must be judged in light of its remaining four arguments.

As its second attack on the award, Local 771 argues, in effect, that the complaint in this lawsuit was a sufficient demand for arbitration under Article 16.01 of the collective bargaining agreement since it put the Company on sufficient notice of Local 771's intention to seek arbitration and the particulars of the dispute to be arbitrated. See Domke, The Law and Practice of Commercial Arbitration, §14.01 (1968). However, the filing of a complaint in a lawsuit did not meet the agreed specifications for demands set out in AAA Rule 7 and incorporated in Article 16.01 of the agreement and, therefore, the arbitrator's refusal to deem it a sufficient demand cannot be termed irrational, ultra vires or a clear error of law.

Similarly, the filing by the Company of the unfair labor practice complaint with the NLRB cannot be said to have tolled the running of the contractual limitary period; the contrary finding by the arbitrator relying on the agreed manner for instituting arbitral proceedings can hardly be called "arbitrary and capricious." The referral of the dispute to the Board for a § 10(k) hearing did not prevent the parties from proceeding to the arbitration of

that dispute. New Orleans Typographical Union No. 17 v. N.L.R.B., 368 F.2d 755, 766-7 (5th Cir. 1966); Local 210, International Printing Pressmen & Assistants' Union v. Times-World Corp., 381 F. Supp. 149, 152 n.3 (W.D. Va. 1974); Cast Optics Corp. v. Textile Workers Union of America, 333 F. Supp. 239, 241 (S.D.N.Y. 1970).

With respect to its fourth argument (i.e. that the Company is estopped from asserting the contractual ninety day limit because of its consistent reluctance to arbitrate), Local 771 cites Los Angeles Newspaper Guild, Local 69 v. Hearst Corp., 504 F.2d 636 (9th Cir. 1974) per Judge Moore of this Circuit sitting by designation, cert. denied, 421 U.S. 930 (1975). This case, Local 771 contends, stands for the proposition that, where for two years the employer "rejects all demands for recognition of the employee's claims and for arbitration," Hearst, supra at 642, a contractual time limit will not bar an arbitration of those claims. However, as the Company points out, Hearst was a case in which the arbitrator

> challenged, sua sponte, his own appointment by the AAA and, by creating a quasi statute of limitations not in the agreement, decided the grievances were not arbitrable.... Hearst, supra at 640. [emphasis added]

It is clear that Hearst does not stand for quite the proposition for which Local 771 cites it. Once again, though the Company's reluctance to submit to arbitration is a consideration of no little significance, it does not indicate that the arbitrator's award is legally infirm.

Local 771's fifth and final attack on the arbitrator's award, viz., that the actual dispute concerning the creative editing work in particular did not arise until after the negotiations held between the Union and the Company broke down in November of 1975, must give way to the arbitrator's finding which is entirely a reasonable one that the post-November issue is merely a refinement of the original dispute over the editing work which arose in February 1975.

Therefore, Local 771's arguments taken separately or together do not demonstrate that the arbitrator's award was so legally or factually unwarranted or irrational or such an excessive exercise of arbitral power as to require vacatur.

III.

The parties have also briefed the issue of whether the result reached on the motions requires dismissal of

this lawsuit altogether. The Company argues that arbitration was Local 771's exclusive remedy, that that remedy was elected by Local 771 thereby waiving any right to judicial relief, that the only judicial relief sought in the complaint in this lawsuit related to arbitration and the preservation of the status quo pending arbitration and, therefore, that Local 771's failure to timely seek arbitral relief precludes any further effort to obtain judicial relief. It contends that the portion of the complaint that seeks "appropriate equitable relief directing defendant to act in compliance with its agreements with plaintiffs and to refrain from acting to prejudice plaintiffs' rights herein" cannot be construed as a request for judicial relief independent of an order to arbitrate and that, even if it could be so construed, such relief is barred by the arbitral proceedings and the resulting award.

The Company misreads both the arbitration clause and the above-quoted portion of the complaint. Article 15.02 of the Agreement provides that "either party shall have the right to refer the matter to arbitration as herein provided." Likewise, Article 16.01 declares that

"[t]he parties may submit to arbitration." [emphasis added] Neither provision grants anything but an option to proceed to arbitration and neither can be termed "mandatory" or "exclusive" in the sense that such descriptions fit the provisions considered in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) [6/]; Chambers v. Beaunit Corp., 404 F.2d 128 (6th Cir. 1968); Columbia Broadcasting System, Inc. v. Radio & Television Broadcast Engineers, Local 1212, 33 Labor Cases ¶71,057 (S.D.N.Y. 1957); and River Brand Rice Mills, Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 110 N.E. 2d 545 (1953) (the cases on which the Company principally relies).

6/ The arbitration provision in Enterprise Wheel provided in part that

> [i]t is understood and agreed that neither party will institute civil suits or legal proceedings against the other for alleged violation of any of the provisions of this labor contract; instead all disputes will be settled in the manner outlined in this Article III -- Adjustment of Grievances.

In addition, nothing in the above-quoted portion of the prayer for relief in the complaint can be construed as limiting that section of the complaint to a request for "status quo" relief alone. The fact that the Union has not, as the Company points out, pursued the above-quoted section of the complaint when effective status quo relief might have been granted only belies the Company's claim that that section is limited to relief going merely to the status quo. Local 771 has argued throughout that the Company's work assignments were in violation of the Agreement between the parties. An order from this Court directing the Company "to act in compliance with its agreements with plaintiffs and to refrain from acting to prejudice plaintiffs' rights herein" would go directly to the ultimate relief sought

and could only have impinged on the domain of the arbitrator.[7/] Therefore, the complaint can only be interpreted as seeking judicial and arbitral relief alternatively.

7/ In an effort to bolster its interpretation of the prayer for relief in the complaint, the Company cites a letter from Local 771 counsel to this Court stating that

> I am glad to have the Court retain jurisdiction either for the purpose of (a) the motion to stay [arbitration], if the employer actually authorizes his attorney to make such a motion, or (b) motion to confirm the award if such a motion is necessary [sic].

However, the Court is not persuaded that this letter can be read as a waiver of any claim for judicial relief independent of an order involving arbitration. Indeed, the letter, which was written well after the NLRB decision, explicitly recognized the possibility that arbitration would be stayed, leaving this or some other Court as the only apparent avenue for resolution of the substantive disputes between the parties.

The Company also argues that the fact that a previous section of the prayer for relief seeks direct declaratory relief indicates that the above-quoted section of that clause only seeks "status quo" relief. However, as acknowledged by the Company, that previous section of the prayers applies only to Local 644 and the dispute over the camera-handling work assignments. It does not limit the subsequent broader portion of the prayers merely because it specifically requests declaratory relief with respect to a dispute not relevant to the issues presently sub judice.

Therefore, the Court must decide whether an arbitrator's finding of procedural non-arbitrability, in a case involving what may be called an optional arbitration provision, is res judicata with respect to a previously filed claim for judicial relief from the same harm alleged in the demand for arbitration.

In River Brand, supra, one of the principal cases cited by the Company, the New York Court of Appeals affirmed the granting of a stay of judicial proceedings under § 1451 of the then-effective Civil Practice Act. See N.Y. CPLR § 7503. That stay was granted on the ground that the dispute in that case was referrable to arbitration, even though arbitration had already been permanently enjoined as being time-barred under a contractual limitary provision. Judge Conway declared that the reason for precluding any judicial action subsequent to an adverse arbitrator's decision on procedural arbitrability was to avoid the flouting of mandatory arbitration clauses[8/]. He reasoned that

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8/ The arbitration clause involved in that case provided that "[a]ny controversy or claim arising out of or relating to this contract shall be settled by arbitration...." [emphasis added]

> Were one of the parties to an arbitration agreement, containing a time limitation, permitted to allow such limitation to expire and then sue at law on the claim which it had agreed to arbitrate, the result would be a return to the situation obtaining when agreements to arbitrate were revocable at the will of the party hereto. River Brand, supra at 41.

In this case, the optional nature of the arbitration clause explicitly gave either party to the agreement the power to choose between the courts and an arbitrator. Whereas the creation of such an option in a case involving a mandatory or exclusive arbitration clause would be a clear abuse (as noted by Judge Conway), option is the essence of the type of arbitration clause the parties bargained for in this case. The rationale of the River Brand opinion is, therefore, clearly inapposite.

Similarly, the reasoning in the other two principal cases cited by the Company, Chambers, supra, and Columbia Broadcasting System, supra, both of which involved mandatory arbitration clauses providing arbitration as

the exclusive form of relief to settle grievances[9/] is not binding or even relevant in this case.

Given the optional nature of the arbitration clause and the Company's refusal to submit to arbitration until after any demand for arbitration had become otiose, the Court can find no relevant distinction between this case and one in which a party is procedurally barred in one forum but goes on to litigate his claims in another forum free from any claim of the bar of res judicata.

9/ As in this case, the arbitration clause in Chambers provided that arbitration would be "binding" (though unlike the clause here, the arbitration clause in Chambers provided that arbitration would be "final and binding" [emphasis added]. Though the Court in Chambers does not quote the full arbitration clause, it does make it clear that the obligation to arbitrate was mandatory, referring to the submission of the dispute to arbitration as a "contractual obligation."

The arbitration clause in Columbia Broadcasting System explicitly declared that failure to make a timely demand for arbitration would constitute a waiver:

> Where any specific grievance has been brought to the attention of CBS and the Union has not proceeded to arbitration under the procedures set out in Section 2.03 for a period of six (6) months subsequent to the date upon which such grievance was first brought to the attention of CBS, said grievance shall be deemed finally waived and disposed of and may not be subsequently arbitrated.

In general, the Company's claim that Local 771's non-purposefully tardy demand for arbitration constituted an irrevocable election of an exclusive remedy must fail in light of the optional nature of the arbitration clause, and the Company's failure to seek a stay of so much of this lawsuit which undeniably sought direct judicial relief.

The substantive claims in the complaint have not been "squarely presented to" and/or passed on by either the NLRB or the arbitrator. See Goldstein v. Doft, 236 F. Supp. 730 (S.D.N.Y. 1964), aff'd, 353 F.2d 484 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966); Driscoll v. Humble Oil & Refining Co., 85 LRRM 2237 (S.D.N.Y. 1973). They may, therefore, be pursued in this Court.

Accordingly, the motion to confirm the arbitrator's award is granted and the motion to vacate is denied, but the pending action for judicial relief may proceed in this Court.

SO ORDERED.

Milton Pollack

August 21, 1976

Milton Pollack
U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -x

LOCAL 771, I.A.T.S.E, AFL-CIO, :

Plaintiff, :

- against - :

RKO GENERAL, INC., WOR DIVISION, :

Defendant. :

- - - - - - - - - - - - - - - - - -x

75 Civ. 906 (MP)

NOTICE OF APPEAL

S I R S :

PLEASE TAKE NOTICE that the defendant above named hereby appeals to the United States Court of Appeals Second Circuit from the portion of the order entered August 24, 1976 which allows this action to proceed in spite of the arbitrator's ruling, confirmed by the Court, that arbitration of the dispute is time-barred under the collective bargaining agreement.

Dated: New York, New York
September 10, 1976

PROSKAUER ROSE GOETZ & MENDELSOHN

By _____
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CLERK OF THE COURT

HOWARD N. MEYER, Esq.
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(19)

5.00 pd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOCAL 771, I.A.T.S.E., AFL-CIO

Plaintiff,

75 Civ. 906 (MP)

- against -

NOTICE OF CROSS APPEAL

RKO GENERAL, INC., WOR DIVISION,

Defendant

S I R S :

Please take notice that the plaintiff above named hereby appeals to the United States Court of Appeals for the Second Circuit from the order entered August 24, 1976 which (a) denies plaintiff's motion to vacate and set aside and (b) grants defendant's motion to confirm an award of an arbitrator acknowledged April 9, 1976.

Dated: New York, New York
September 22, 1976

By _____
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To:

CLERK OF THE COURT

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